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No. 85-482 (5)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

v.

THELMA COUSINEAU, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARK COUSINEAU,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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COUNTER-STATEMENT OF THE CASE

At the time of Mark Cousineau's death from injuries received due to the explosive separation of a multi-piece rim, there were alternative rims available other than the type of rim that he was handling. Petitioner's statement regarding the availability of an alternative rim is misleading.[1]

However, the Firestone Tire & Rubber Company had designed and patented a single-piece rim for use on tubeless truck tires of the size involved in the subject accident, as early as 1955. Appendix D at 35a.

The energy inside the tire, which is literally thousands and thousands of foot pounds of energy, is transferred to the removable portions of the multi-piece rim (side ring and lock ring) during an explosive separation.

During the years before the subject accident, the users of multi-piece rims had not been adequately apprised nor warned regarding safe handling procedures or the inherently dangerous nature of the rims. This cannot be better illustrated than by the memo of R.M. Smith, a rim engineer of Motor Wheel (Rim Division of the Goodyear Tire & Rubber Company). Appendix E at 43a.

The most salient points of this memo are:

"The parts are inherently dangerous . . ."

"When in use the dangerous condition is often masked."

"We know that these parts, especially old and damaged parts, sometimes catastrophically cease to serve their intended purpose."

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[1] "Petitioner knows of no wheel manufacturer in the world that has invented a *single* piece wheel (such as is used for passenger car tires) upon which a tube-type truck tire of the size involved in this case can physically be mounted and operated on the type of truck involved." Pet. Br. 3 n.3.

"The time at which the usefulness ceases is dependent on chance, . . ."

"He [user] does not recognize the possible dangers associated with the product."

"We have expert knowledge with regard to maintenance. Such information is published, but the information may not reach the involved user. If it does, he apparently doesn't see any reason for it."

"We have expert knowledge with regard to serviceability (possibly negative type of knowledge). Such information is not detailed in our publications. The involved user cannot tell a 'good' part from a 'bad'."

"What could we do?

1. Recall.

or 2. Advisory to alert the public to danger by
DOT
Industry association
Goodyear.

or 3. Sales campaign.

plus 4. Education."

"What would happen?

1. Any positive action to get parts out of use will probably result in more liability suits and higher damage awards, but at the same time should reduce the number of accidents." Appendix E at 43a.

Thus, the rim industry knew of the problems with the multi-piece rims for decades before the subject accident. Appendix D at 37a-42a.

Despite the rim industry's recognition of the problems with the rims and the resulting injuries and death, it took no reasonably definitive steps to accept responsibility and correct the problems. Its primary concern was to prevent any voluntary or government recall, any inconsistency in warning information provided by the various rim manufacturers,

and any variation in rim design by the rim manufacturers. The reason for this is easily explained when it is recognized that as of the late 1970's there were approximately 53,000,000 multi-piece rims and wheels in service and that the economic impact, as viewed by the rim manufacturers, of a governmental mandated switch from multi-piece rims and tubed tires to one-piece tubeless and tubeless tires would be in excess of 8.7 billion dollars. Appendix D at 41a-42a.

During the years before the subject incident, the rim industry was primarily controlled by four companies — the Firestone Tire & Rubber Company, The Goodyear Tire & Rubber Company, The Budd Company and Kelsey-Hayes Corporation. Appendix F at 45a-47a.

A multitude of acts illustrate a concert of action among those who primarily control the rim industry. By way of example and not limitation:

Engineer Smith's memo indicating that if Goodyear recalled the rims, Goodyear would be criticized by others in the industry. Appendix E at 43a-44a.

Firestone's successful attempts at stopping Goodyear from placing on-product warning labels on Goodyear rims. Dave Dohnal was in-house counsel for Goodyear. The handwritten notation on the Firestone interoffice memo from D.P. Zart, indicating that Firestone "must stop them" with respect to the on-product warning labels, revealed that Dave Dohnal would kill the plan until further discussion. No such labels were ever placed on any multi-piece rims. Appendix G at 48a.

Communication among the manufacturers to insure that the companies were not taking different positions on warning literature, to the point that one rim manufacturer stated that if confronted by another company's warning, he would be "compelled to argue its inadequacy and affirmatively dangerous nature which would not inure to anyone's benefit." Appendix H at 49a.

Industry meetings on duty to warn literature to insure that the companies were taking consistent positions on warning literature and to alleviate any concerns that "companies may be taking different positions on the subject and embarrass each other and the industry in general." Appendix H at 49a-50a, Appendix I at 51a-52a.

Forming associations with antitrust implications to "serve" the "needs" of Firestone, Motor Wheel (Goodyear), Budd and Kelsey-Hayes. Appendix J at 54a.

The standardization of rims within the industry. Appendix K at 57a.

The exchange of drawings to enhance the standardization of rims. Appendix L at 58a-59a, Appendix M at 60a and Appendix N at 61a.

The formation of a Multi-piece Rim Committee for purposes of a unified response to NHTSA's proposed multi-piece rim rule. Appendix O at 62a.

Forming an association to take part in activity which included constitutionally protected activity but which corroborated the industry's concerted activity in other respects:

Attempting to convince the government that the solution to the problem of multi-piece rims was the passage of the proposed OSHA standard to insure that proper procedures were employed in the dismounting and reassembling of tires of multi-piece rims, while failing to take any independent equivalent action. Appendix D at 42a.

Promoting safety legislation through Washington organizations to remove all of the "burden" from Wheel and Rim manufacturers. Appendix P at 64a.

Recognition that despite their efforts to petition for an OSHA standard requiring employers to train and instruct tire mechanics, that they did not have an adequate train-

ing program for their own employees. Appendix Q at 65a.

Respondent has never contended that the petitioning for the OHSA standard was tortious activity. Instead, Respondent has merely contended that there are certain documents and information which are associated with the petitioning campaign which corroborate other tortious activity, as part of the concert of action.

Counsel for decedent obtained a rim from decedent's employer, which the employer felt was similar in shape and configuration to the accident rim. This rim was marked as Exhibit 1 to the deposition of one of the plaintiff's employers, Ronald Jaeger. Ronald Jaeger and his brother John Jaeger operated the construction business, for which decedent was employed at the time of the accident. Ronald Jaeger supervised the operation in the yard, as opposed to his brother, who supervised the office aspects of the construction company. Appendix S at 73a-74a.

Ronald Jaeger testified that he observed the accident tire and rim after the incident. Appendix R at 67a. Afterwards he set the accident rim aside and it was ultimately sent to a building for storage. The rim was subsequently returned to the original construction facility. At that time, it became comingled with other rims. Appendix R at 68a.

Ronald Jaeger testified that the wheel which was marked as Exhibit 1 was similar to the accident wheel, in that it consisted of three pieces and was the same shape, size and configuration. Appendix R at 68a-70a.

Throughout various portions of his testimony, both on April 1st and 2nd, 1981, Ronald Jaeger testified that there had not been any explosive disengagements of multi-piece rims at his construction company, other than the subject incident. The most succinct testimony indicates as follows:

"Q. You don't recall having any other incident where a multi-piece rim — three-piece tire disengaged prior to the accident; isn't that right?

A. That's right."

Appendix S at 74a; Appendix R at 71a - 72a.

Jack L. Campau, an engineer who had previously been involved in multi-piece rim litigation in various cases and states, has examined the wheel which was marked as Exhibit 1 in Ronald Jaeger's deposition. Following the examination, Mr. Campau executed an affidavit. As referenced in the affidavit, the three pieces of the three-piece multi-piece rim consist of rim base, side ring and lock ring, all of which were manufactured by The Firestone Tire & Rubber Company on various dates, as best can be ascertained from the rim, in February, 1968; August, 1959; and October, 1959, respectively. Mr. Campau further indicates that the lock ring is "opened up and slightly spiral" which is a condition which would not result from normal servicing and probably resulted from a separation under pressure. A preliminary review of the literature, by Mr. Campau, suggests that the assembly contains mismatched parts and that mismatched parts contribute to the separation of rim components. Appendix T at 76a.

Respondent commenced suit in the Circuit Court for the County of Wayne, Michigan, on October 29, 1980. At that time, Rule 301.3 of the Rules of the Circuit Court for the Third Judicial Circuit - Wayne County, provided as follows:

".3 Time Limits; Witness List.

"This subrule applies to cases on the General Civil Docket filed on or after January 1, 1980. Cases filed before January 1, 1980, are governed by the provisions of former LCR 301.7 and 301.11.

". . . (c) Discovery Cutoff. Discovery must be completed twenty-six months after the filing of the case."

The Trial Court entered an Order granting defendants summary judgments on December 10, 1982. This was prior to the close of discovery. Additionally, Respondent had outstanding and unfulfilled discovery requests pending at the time that the Court entered the summary judgments. Appendix U at 86a - 90a.

Plaintiff-Respondent appealed the trial court's decision of right to the Michigan Court of Appeals. On August 9, 1984, the Michigan Court of Appeals issued an unpublished Opinion. Appendix A at 1a. Plaintiff-Respondent requested publication of said Opinion. Defendants objected to the publication of said Opinion. On January 2, 1985, an Amended Opinion was issued by the Michigan Court of Appeals, which was a published Opinion. *See Cousineau v. Ford Motor Co.*, Appendix B at 15a, 140 Mich. App. 19, 363 N.W.2d 721 (1985).

In the unpublished Opinion the Court's entire comments as they relate to the concert of action claim against the rim manufacturers are as follows:

> Plaintiff also submitted proof to show the defendant wheel manufacturers acted jointly, pursuant to a common design. **First, although defendants are correct insofar as the OSHA petition campaign cannot be viewed as tortious activity,** the same activity evidences an awareness on the part of the wheel industry *as a whole* of the gravity of the problem. Moreover, if it was feasible for employers to warn and train their employees as to the danger of multi-piece wheels, then it would have been equally feasible for the wheel manufacturers to assist in doing the same. Instead, they proposed a government role in the process to relieve themselves of the burden. It is noteworthy that the decedent's accident occurred a short time before OSHA finally promulgated the regulation urged by defendants. Furthermore, the adequacy of the manufacturers' warnings is a question of fact for the jury. *Dunn, supra*, p 80. Here, it is not clear from the record whether plaintiff had any warning whatsoever from the manufacturer of the wheel, or that any of the

> defendant wheel manufacturers were in the practice of supplying warnings to those affected by the use of their products.
>
> Second, plaintiff provided evidence that the defendant wheel manufacturers were aware of the dangers posed by mismatch of component parts. Rather than change the design of the components themselves, they composed charts to show which products were safely interchangable and which were not. Again, there was no indication that such a chart found its way into the decedent's hands.
>
> Third, plaintiff might submit proofs at trial that *all* three-piece rims pose risks which are 'unreasonable in light of the foreseeable injuries'. *Owens* v *Allis-Chalmers Corp*, 414 Mich 413, 425; 326 NW2d 372 (1982). The OSHA petition activity was, arguably, a cooperative effort by the wheel manufacturers to create a regulatory buffer and avoid responsibility for those risks. The venture indicates a tacit understanding and mutual encouragement to refrain from taking more direct steps to prevent the danger.

Appendix A at 11a-12a. (Emphasis added).

The Michigan Court of Appeals' entire reference to the rim manufacturers' involvement in the concert of action in its Amended Opinion is as follows:

> Plaintiff made a sufficient showing that defendant wheel manufacturers acted jointly in failing to warn of a danger in their products to survive their summary judgment motion. Plaintiff submitted an affidavit and other data to show that the wheels and the mismatch of wheel components posed a danger, and that the defendants were aware of the numerous incidences of death and injury resulting from wheel explosions. The record does not establish that plaintiff had any warning whatsoever from the wheel manufacturers, or that any of these manufacturers were in the practice of supplying warnings to those affected by the use of their products. Although

defendants argue that their products are safe when used properly, and that they took adequate measures to warn those working with the wheels, these arguments relating to the reasonableness of their conduct are for the trier of fact. *Smith, supra,* pp 88-90; *Dunn* v *Lederle Laboratories,* 121 Mich App 73, 79-80; 328 NW2d 576 (1982), *lv den* 417 Mich 1098 (1983). By engaging in the joint OSHA petition campaign, the wheel manufacturers arguably proposed a government role to relieve themselves of their duty to warn those working with the multi-piece rims.[2]

Plaintiff provided documentation showing that the multi-piece rims manufactured/marketed by the wheel manufacturers were dangerous, and that the manufacturers knew of the danger posed by their products and the mismatch of components of their products. Plaintiff might submit proofs at trial that all three-piece rims posed risks 'unreasonable in light of the foreseeable injuries'. *Owens, supra,* p 425. Plaintiff also showed that, rather than change the design of the rims or the rim components, the wheel manufacturers acted jointly in exchanging information and composing charts to show which products were safely interchangeable and which were not. This conduct, as well as the OSHA petition campaign, could indicate a tacit understanding and mutual encouragement to refrain from taking more reasonable steps to prevent the danger posed by the multipiece wheel rims.

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[2] **Defendants are correct insofar as the OSHA petition campaign cannot be viewed as tortious activity.** Nonetheless, the same activity indicates an awareness of the wheel industry as a whole of the gravity of the problem and could be interpreted as a cooperative effort to avoid responsibility for the risks posed by multipiece rims.

Appendix B at 25a - 26a, 140 Mich. App. at 33-34, 363 N.W.2d at 729 (emphasis added).

The issue of proximate cause, as it relates to the concert of action claim, was also addressed by the Michigan Court of Appeals in its Amended Opinion. The court stated:

> In addition, plaintiff would have to establish that the above alleged tortious activity engaged in by the wheel manufacturers proximately caused the injury. Although the explosion of the multi-piece rim caused decedent's death in fact, the question of proximate cause is whether or not the conduct of the wheel manufacturers was so significant and important a cause that they should be legally responsible. *Moning, supra,* p 438. Although proximate cause is a question of law where there are no factual disputes, *Moning, supra,* pp 438-439, in a negligence action (which is essentially the underlying tortious activity of plaintiff's concert of action claim), any doubts about the relationship between cause and effect should be resolved by the trier of fact. *Fiser* v *City of Ann Arbor,* 417 Mich 461, 475; 339 NW2d 413 (1983). Summary judgment can only be granted if reasonable persons could not differ in finding that the wheel manufacturers' conduct was not a proximate cause of the injury. *Fiser, supra,* p 470; *Davis* v *Thornton,* 384 Mich 138, 142-146; 180 NW2d 11 (1970). Because summary judgment for defendant wheel manufacturers was not granted on this ground, we leave this question for the trial court.

Appendix B at 26a, 140 Mich. App. at 34-35, 363 N.W.2d at 729-30.

Proximate cause can be established by the fact that the decedent did not possess sufficient knowledge to safely handle these rims. Had the Petitioner and the other defendant rim manufacturers provided sufficient instructions and warnings, recalled the rims, and made the parts incapable of mismatch, the subject accident would not have occurred. However, discovery has not been fully explored on this issue and, therefore, Respondent does not wish to limit herself but simply offers suggestions to the Court that the proximate cause issue is not insurmountable on her behalf.

On December 26, 1984, Petitioner applied to the Michigan Supreme Court for leave to appeal the decision of the Michigan Court of Appeals. Following the Michigan Court of Appeals issuance of the January 2, 1985 Amended Opinion, Petitioner filed a Supplemental Brief to its December 26, 1984 Application for Leave to Appeal, on January 22, 1985, addressing the issues raised by the Michigan Court of Appeals Amended Opinion.

At that time the grounds for the Michigan Supreme Court granting leave to appeal were governed by Rule 853 of the Michigan General Court Rules of 1963:

Rule 853 Appeals from Decisions of Court of Appeals

.1 Grounds. Appeal may be taken to the Supreme Court only upon application and leave granted, in the discretion of the Supreme Court, from any decision of the Court of Appeals, interlocutory or final, upon a showing of a meritorious basis for appeal and any one of the following grounds.

(1) The subject matter of the appeal involves legal principles of major significance to the jurisprudence of the State.

(2) The decision of the Court of Appeals is clearly erroneous and will cause material injustice.

(3) The decision is in conflict with decisions of the Supreme Court or other Court of Appeals decisions.

(4) In any appeal of an interlocutory order of the Court of Appeals, it must be shown that appellant would suffer substantial harm by awaiting final judgment before taking appeal.

On June 24, 1985, the Michigan Supreme Court issued an Order denying the Petitioner's Application for Leave to Appeal the decision of the Michigan Court of Appeals. Appendix C at 30a - 31a.

SUMMARY OF ARGUMENT

The writ should not be granted because there are no special and important reasons for granting same. The gravamen of Petitioner's reasons offered to this Court for granting the writ is that a state court, the Michigan Court of Appeals, has decided a federal question, the question presented, in a way in conflict with applicable decisions of this Court, the *Noerr-Pennington* doctrine. However, the Michigan Court of Appeals did not rule that defendant rim manufacturers could be held liable in tort based on their joint activity in petitioning the government. Nor, did the Michigan Court of Appeals decision violate the *Noerr-Pennington* doctrine.

The Michigan Court of Appeals carefully followed the *Noerr-Pennington* doctrine. It did not rule that the joint petitioning activity was illegal or tortious activity, either standing alone or as part of a broader tortious scheme. The Court simply followed the *Noerr-Pennington* doctrine by applying the evidentiary qualification to the doctrine explained in the *Pennington* opinion to the facts of the instant case. In so doing, it considered evidence of and surrounding the joint petitioning activity which showed the purpose and character of the particular transactions under scrutiny, in determining whether summary judgment should be granted. As a result, the Michigan Court of Appeals decision does not conflict with the *Noerr-Pennington* doctrine and does not present a special and important issue for this Court to decide.

Finally, if this Court should grant the writ, the instant case will still have to be returned to the trial court for further proceedings because there is sufficient evidence, other than that alluded to in the joint petitioning activity, to defeat Petitioner's summary judgment motion.

I. THE WRIT SHOULD NOT BE GRANTED BECAUSE THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

The writ should not be granted because there are no special and important reasons for granting same. Sup. Ct. R. 17.1. Supreme Court Rule 17.1 states that a writ of certiorari "will be granted only when there are special and important reasons therefor." The rule further lists the reasons that will be considered by this Court in its determination of whether or not to grant certiorari.[2] The instant case does not fit into any of the categories of reasons listed in the rule.

The gravamen of the reasons Petitioner offered to this Court for granting the writ is that the Michigan Court of Appeals decision, *Cousineau* v *Ford Motor Co.*, 140 Mich. App. 19, 363 N.W.2d 721 (1985), violates the *Noerr-Pennington* doctrine previously enunciated by this Court in *Eastern Railroad President's Conference* v *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers* v *Pennington*, 381 U.S. 657 (1965). Thus, it is apparent that the only reason, as listed in Supreme Court Rule 17, which is applicable to the Firestone Tire & Rubber Company's petition is the second one listed under Supreme Court Rule 17.1 (c), "a state court . . . has decided a federal question in a way in conflict with applicable decisions of this Court." However, the Michigan Court of Appeals never ruled that the defendant rim manufacturers could be held liable under

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[2] "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." S. Ct. R. 17.1.

a tortious concert of action theory based on their joint activity in petitioning the government. Nor did the Michigan Court of Appeals decision violate the *Noerr-Pennington* doctrine. Therefore, there is no special or important reason why this writ should issue.

A. THE MICHIGAN COURT OF APPEALS DID NOT HOLD THAT PETITIONER'S JOINT PETITIONING ACTIVITY COULD BE THE BASIS OF A TORT CLAIM.

Nowhere in the Michigan Court of Appeals decision did the Court rule that Petitioner's joint petitioning activity could be the basis of a tort claim. Appendix B at 25a; *Cousineau* v *Ford Motor Co.*, 140 Mich. App. 19, 363 N.W.2d 721 (1985). In a footnote, the Court even acknowledges that "defendants are correct insofar as the OSHA petition campaign activity cannot be viewed as tortious activity." Appendix B at 25a, 140 Mich. App. at 34 n.2, 363 N.W.2d at 729 n.2.

Furthermore, the Michigan Court of Appeals makes it clear that Respondent made a sufficient showing that defendant rim manufacturers acted jointly in failing to warn of a danger in their products to survive their summary judgment motions. Appendix B at 25a, 140 Mich. App. at 33, 363 N.W.2d at 729. This was based on an affidavit and data other than that which was alluded to in the joint OSHA petition campaign. Appendix B at 25a, 140 Mich. App. at 33, 363 N.W.2d at 729. Consequently, the Michigan Court of Appeals did not even suggest that Petitioner's joint petitioning activity could be the basis of a tort claim.

B. THE DECISION OF THE MICHIGAN COURT OF APPEALS DOES NOT VIOLATE THE *NOERR-PENNINGTON* DOCTRINE.

In *Eastern Railroad President's Conference* v *Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961), the Court held that no violation of the antitrust laws can be predicated upon mere attempts to influence the passage or enforcement

of laws. In *United Mine Workers* v *Pennington*, 381 U.S. 659, 670 (1965), the Court held that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." Thus, the so called *"Noerr-Pennington"* doctrine, shields from liability joint petitioning activity by business entities.

Respondent acknowledges that this doctrine applies to all departments of the government, including the federal Occupational Safety and Health Administration. *See California Motor Transport Co.* v *Trucking Unlimited*, 404 U.S. 508 (1972). Furthermore, Respondent does not dispute that the rationale of the *Noerr-Pennington* doctrine extends to non-antitrust contexts. Pet. Br. 12. Once the *Noerr-Pennington* doctrine is applied to the facts of the instant case, it is clear that the Michigan Court of Appeals carefully followed this Court's decisions in *Noerr, supra, Pennington, supra,* and *California Motor Transport, supra.*

In *Pennington,* the Court held that activity protected under *Noerr* "is not illegal, either standing alone or as part of a broader scheme violative of the Sherman Act." 381 U.S. 657, 670 (1965). Similarly, the Michigan Court of Appeals held that the protected joint petitioning activity, "the OSHA petition campaign [,] cannot be viewed as tortious activity." Appendix B at 25a n.2, 140 Mich. App. at 34 n.2, 363 N.W.2d at 729 n.2.

However, in a *Pennington* footnote, the Court explained the following qualification to the *Noerr-Pennington* doctrine:

> It would of course still be within the province of the trial judge to admit this evidence, [the evidence of the joint petitioning activity] if he deemed it probative and not unduly prejudicial, under the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends to show the purpose and character of the particular transactions under scrutiny.

381 U.S. 657, 670-71 n.3.

The Michigan Court of Appeals acted within the scope of the *Pennington* footnote qualification, when it considered evidence of or surrounding the joint petitioning activity. The Michigan Court of Appeals correctly found that the joint petitioning activity with respect to the issues of failure to adequately warn and instruct could be admitted to show the awareness of the defendant rim manufacturers of the great danger posed by their products, the awareness of the defendant rim manufacturers that any current warnings and instructions were inadequate and ineffectively distributed and an intent on behalf of the rim manufacturers not to issue warnings regarding the rims. Several United States Courts of Appeals have interpreted the *Pennington* footnote qualification in a similar manner. *See Affiliated Capital Corp.* v *City of Houston*, 735 F.2d 1555, 1564-65 (5th Cir. 1984) (agreements among defendant cable television competitors which divided city into exclusive territories presented to mayor and city council for approval were admissible as evidence of defendants' intent to conspire); *MCI Communication Corp.* v *American Telephone and Telegraph Co.*, 708 F.2d 1081, 1160 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 234-35 (1983) (state tariff filings made for the purpose of influencing government action were admissible as evidence of purpose and character of other business decisions); *Alexander* v *National Farmers Organization*, 687 F.2d 1173, 1196 (8th Cir. 1982), *cert. denied*, 461 U.S. 937-38 (1983) (Evidence of the activities of dairy cooperatives in contacting the government and proposing legislation to hamper a farmers' lobbying organization from becoming qualified by the U.S.D.A. on federal marked orders held admissible to show the purpose and concerted character of the cooperatives' contemporaneous nonexempt activities and the specific intent to block the lobbying organization from competing as a qualified cooperative); *Household Goods Carriers' Bureau* v *Terrell*, 452 F.2d 152 (5th Cir. 1971) (evidence, including correspondence showing evidence of attempts by defendants to influence Finance Center of the U.S. Department of Defense not to adopt plaintiff's mileage guide, was properly admitted by trial court as circumstantial

proof of the purpose and character of actions of defendants, to rebut insinuations of defendants, and to prove the existence of a conspiracy between defendants).

Since the Michigan Court of Appeals did not rule that the joint petitioning activity itself was illegal or tortious, either standing alone or as part of a broader tortious scheme, its opinion does not conflict with the *Noerr-Pennington* doctrine and does not infringe upon Petitioner's First Amendment right to petition the government.

C. IF THIS COURT SHOULD GRANT THE WRIT, THE CASE WILL HAVE TO BE RETURNED TO THE TRIAL COURT BECAUSE THERE IS SUFFICIENT EVIDENCE, OTHER THAN THAT ALLUDED TO IN THE JOINT PETITIONING ACTIVITY, TO DEFEAT PETITIONER'S SUMMARY JUDGMENT MOTION.

Under Michigan law, a plaintiff is entitled to recover from defendant rim manufacturers on a concert of action theory if she can prove that they acted tortiously pursuant to a common design and that such action proximately caused the injury. *Abel* v *Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164 (1984). Plaintiff can prove such tortious activity pursuant to a common design if she establishes that the wheel manufacturers, acting jointly, breached their duty to warn of the danger posed by their products or that the wheel manufacturers, acting jointly, manufactured or marketed an unreasonably dangerous product. *See Owens* v *Allis-Chalmers Corp.*, 414 Mich. 413, 326 N.W.2d 327 (1982); *Moning* v *Alfono*, 400 Mich. 425, 254 N.W.2d 759 (1977). Under Michigan law, a summary judgment motion should not be granted unless it is impossible for the claim asserted to be supported by evidence at trial. *Rizzo* v *Kretschmer*, 389 Mich. 363, 207 N.W.2d 316 (1973). A showing of some evidence precludes summary judgment. *Id.*

After limited discovery, Repondent has been able to supply evidence that establishes that defendant rim manufac-

turers, acting jointly, breached their duty to warn and manufactured or marketed an unreasonably dangerous product. This is supported by the many examples in the factual section of Respondent's Brief in Opposition to the Writ. Appendices D-O at 32a-62a.

The aforementioned documents are sufficient in and of themselves to show "some" evidence of the tortious activity and joint action required to defeat summary judgment under Michigan law. Therefore, even if this Court grants the writ the case will still have to be returned to the trial court.

CONCLUSION

The Michigan Court of Appeals did not rule that defendant rim manufacturers could be held liable in tort based on their joint activity in petitioning the government. The Michigan Court of Appeals correctly applied the *Noerr-Pennington* doctrine to the instant case. Thus, the Michigan Court of Appeals has not decided a federal question in a way in conflict with applicable decisions of this Court and there are no special and important reasons for granting the writ.

For all the foregoing reasons, Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED,

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Dated: October 18, 1985

No. 85-482

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

v.

THELMA COUSINEAU, PERSONAL REPRESENTATIVE OF THE ESTATE OF MARK COUSINEAU,
Respondent.

APPENDIX

ROBERT A. TYLER, P.C.
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APPENDIX A

Appendix A
Opinion

OPINION

STATE OF MICHIGAN COURT OF APPEALS

THELMA COUSINEAU, Personal Representative of the Estate of MARK COUSINEAU,

Plaintiff-Appellant,

v

[Aug 09 1984]
No. 69363

FORD MOTOR COMPANY, a foreign corporation, INTERNATIONAL HARVESTER COMPANY, a foreign corporation, GOODYEAR TIRE & RUBBER COMPANY, a foreign corporation, KELSEY HAYES CORPORATION, a foreign corporation, BUDD CORPORATION, a foreign corporation, FIRESTONE TIRE & RUBBER COMPANY, a foreign corporation, FRUEHAUF CORPORATION, a foreign corporation, and AMF, INC., a foreign corporation,

Defendants-Appellees.

Before: R.S. Gribbs, P.J., H. Hood and R.M. Maher, JJ.
PER CURIAM

Plaintiff appeals by right from an order granting summary judgment for defendants on her wrongful death claim, and a subsequent order denying her motion for reconsideration and denying her leave to amend her complaint. We affirm in part and reverse in part.

Plaintiff brought suit on October 29, 1980, alleging her son, Mark Cousineau (decedent), was killed on May 8, 1979, while repairing a truck tire mounted on a three-piece wheel. Decedent was an employee of Jaeger Brothers Construction Co, which owned several trucks, including four or five made by Ford, two by International Harvester, and at least one Fruehauf Trailer. In addition, Jaeger Brothers had numerous tires and wheels collected from other trucks at the work-

place. On May 8, 1979, decedent, who had only been employed for two days, was assigned to repair truck tires. While decedent was working on a three-piece rim, the wheel explosively disengaged, striking and killing decedent. Ronald Jaeger found a three-piece rim held together by a safety chain at the accident site. The tire was still intact and was subsequently used. The rim parts were at first kept separate, but were later mixed with the general rim stock of the business, rendering identification of the rim involved in the accident impossible.

Plaintiff sued wheel manufacturers Goodyear, Kelsey Hayes, Budd and Firestone, and vehicle manufacturers Ford and International Harvester. Plaintiff claimed decedent's injuries resulted from negligent wheel design, failure to adequately warn, and failure to provide safety devices by the wheel manufacturers. She further alleged that the defendant vehicle manufacturers negligently produced and sold vehicles which required and/or utilized multi-piece wheels. Plaintiff's complaint also contained an allegation of breach of implied warranty.

Goodyear and Kelsey Hayes moved for a more definite statement of the claim, stating that plaintiff "must be required to identify the manufacturer of the wheel and rim" involved in the accident, and "must be ordered to identify one vehicle manufacturer".

Plaintiff filed an amended complaint and added Fruehauf (vehicle manufacturer) and AMF (wheel manufacturer) as defendants. In the amended complaint, plaintiff set forth claims of alternative liability and concert of action.

All defendants except AMF and Fruehauf moved for summary judgment pursuant to GCR 1963, 117.2(1) and (3), based on plaintiff's inability to attribute the wheel in question to a particular wheel or vehicle manufacturer. Plaintiff

admitted, then as now, that she could not identify the specific manufacturer of the subject wheel or the vehicle from which it came. Attached to the wheel manufacturers' motions were affidavits of their employees, each of whom averred that defendants' products are identifiable, since they are stamped with a part number and name of the manufacturer. In addition, the affiants for Firestone and Budd stated that truck rims are distinguishable from one another because of the multiplicity of rim designs. International Harvester submitted an affidavit and company records showing that the International Harvester truck owned by decedent's employer was originally equipped with two-piece rims.

After two adjournments of the motion for summary judgment to permit discovery, plaintiff filed a response to the motions. She asserted that the named defendants included "the only major manufacturers" of three-piece wheels "similar to the one that plaintiff's decedent was handling at the time of his injury". Regarding the identification issue, plaintiff argued that the manufacturer's stamp "is subject to wear, rust and corrosion" which "obliterates the identification". Plaintiff contended that truck rims made by various defendants are "very similar in size and configuration", that "there was no one design that could be identified with one specific manufacturer", and that "the wheels are essentially of a generic design". Plaintiff also stated that the manufacturer of a wheel assembly could not be determined "without the closest of examination".

In support of her alternative liability and concert of action claims, plaintiff submitted numerous documents obtained through discovery. The pertinent matter in the exhibits is summarized as follows:

The manufacturers of three-piece rims were made aware, through accident reports, of the problems arising from their products, but ascribed the problems to improper "shop

practices". These practices included non-compliance with the manufacturers' recommended procedures for assembly, disassembly, and maintenance and safety precautions. Firestone urged vehicle manufacturers to print warning materials in the vehicle owner manual. However, the wheel manufacturers felt that printed warnings on the rim components themselves could be ineffective since they would be covered by corrosion. In a letter to Budd dated May 11, 1976, an attorney for Firestone denigrated the effectiveness of such warnings and further stated, "I would hate to be confronted by a plaintiff's lawyer with another company's warning if my product did not have one". The same letter proposed an industry meeting and urged that the different manufacturers not take varying positions on the warning issue.

Beginning in 1976, the wheel manufacturers, through the "Rubber Manufacturers Association" and "Multipiece Rim Manufacturers" organizations, campaigned for promulgation of federal OSHA standards governing work with multi-piece rims. Their goal was "to remove all of the burden from the Wheel and Rim manufacturers" and to place responsibility for safety precautions "on the only person in practical position to discharge such responsibility, *i.e.* the employer". In April of 1980, OSHA promulgated a regulation requiring the posting of information and warnings in truck tire maintenance facilities, and training of mechanics working with multi-piece wheels.

A Budd document dated February 2, 1976, noted the tendency of "standardization" in the truck rim industry and the dangers posed by the similarity of different products. It noted that, while some rim components manufactured by different companies were interchangeable, in some cases "mixed side rings are a definite safety hazard". The manufacturers exchanged information on part interchangeability so that charts could be formulated to guide mechanics on this problem.

The defendant vehicle manufacturers purchased substantial numbers of multi-piece rims for use as original equipment. The petition to OSHA indicates that 98% of all multi-piece rims sold are used as original equipment. However, there is no evidence in the record that vehicle manufacturers, as opposed to wheel manufcturers, were involved in the OSHA petition campaign. References to defendant wheel manufacturer AMF were also absent from plaintiff's documents, since AMF sold its truck rim subsidiary ("Cleveland Welding Division") to Budd in 1959.

At the December 10, 1982, hearing on the motion for summary judgment, plaintiff argued that summary judgment would be premature, since discovery was not complete. Counsel for Goodyear replied that no amount of discovery would disclose the identity of the manufacturer of the wheel involved in the accident. In granting the motion in favor of defendants, the trial judge stated, "We're not talking about a generic product that cannot be identified". Rather, the court concluded, "This is a case where the wheel that we're talking about disappeared".

Prior to the grant of summary judgment, plaintiff moved for leave to amend her complaint. She submitted a proposed third amended complaint containing an allegation of civil conspiracy, and a fourth amended complaint which advanced a claim of "enterprise liability". *Hall* v *E. I. DuPont De Nemours & Co*, 345 F Supp 353 (E D NY 1972). At the hearing on the motions to amend, plaintiff conceded "there's no cause of action for conspiracy unless you've got an underlying cause". Plaintiff also requested reconsideration of the grant for summary judgment.

The trial judge denied leave to amend the complaint without comment. He also denied the motion for reconsideration, distinguishing *Abel* v *Eli Lilly & Co*, 94 Mich App 59; 289 NW2d 20 (1979), *aff'd* 418 Mich 311; 343 NW2d 164 (1984).

Alternative Liability

Plaintiff first contests the granting of the summary judgment for defendants on plaintiff's alternative liability claim. She argues that the theory of alternative liability applies where a plaintiff, through no fault of his own, cannot identify the specific defendant responsible for his injuries.

The trial court did not specify the court rule underlying its grant of summary judgment. It granted summary judgment because the wheel would be identifiable if it were available, basing this conclusion on plaintiff's admission and defendant's affidavit. Since the court went beyond the pleadings in reaching its decision, the judgment will be reviewed as granted pursuant to GCR 1963, 117.2(3). Under this court rule, the nonmoving party must establish that he has a case on the law and that there are some evidentiary proofs to support his allegation as to any material fact. *Durant* v *Stahlin*, 375 Mich 628, 638; 135 NW2d 392 (1965).

Substantial guidance is provided by the recent decision in *Abel*, in which the Supreme Court expressed formal approval of the theory of alternative liability. 418 Mich 329. As noted by this Court in *Greene* v *Union Optical Center*, 95 Mich App 167, 171; 290 NW2d 111 (1980), "[i]n certain situations, a plaintiff's burden of proof may be shifted to the defendants where more than one defendant has been negligent and the plaintiff is unable to prove which of the two defendants caused his injury". Prerequisite to such a shift, plaintiff must show, first that all defendants acted tortiously; second, that plaintiff was harmed by one of the defendants; and, third, that plaintiff, "through no fault of [his or her] own, [is] unable to identify which actor caused the injury. *Abel*, 418 Mich 331-332. Plaintiff fastens her argument onto the latter language, ignoring the policy underlying alternative

liability theory. That policy was clearly stated by the Court in the *Abel* opinion:

> "[The] reason for the exception to traditional rules is to prevent the injustice of allowing proved wrongdoers to escape liability for an injury inflicted upon an innocent plaintiff 'merely because *the nature of their conduct and the resulting harm made it difficult or impossible to prove which of them has caused the harm.*' " 418 Mich 327, *citing* 2 Restatement Torts, 2nd, §433B, Comment f, p 446 (emphasis added).

In *Abel*, the plaintiffs alleged they were harmed by their consumption of synthetic estrogens. 418 Mich 318. Their inability to identify the specific manufacturer which caused the harm resulted from the inherent nature of the product. Once ingested, the medication was irretriveable for use as evidence. Also, plaintiffs alleged that defendants used "a generic marketing scheme to promote the product". 418 Mich 336. In its decision in *Abel*, this Court noted the difficulties posed by the number of defendants and by the length of time between the ingestion of the allegedly defective drug and the appearance of the damages. 94 Mich App 76. In this case, the wheel assembly which gave rise to the injury did not disappear, nor was its source rendered unidentifiable by the defendants' conduct. It remained available for use as evidence and was, in fact, kept separate from the wheel inventory of decedent's employer for quite some time. Plaintiff argues that the similarity of three-piece rims renders them unidentifiable, but admits the wheel could be identified if it were available. The interchange of parts between wheel rim manufacturers indicates only that more than one manufacturer may have made the components in question, not that the parts could not be identified. Plaintiff further contends that the identifying stamp on the product was probably obscured by dirt and corrosion, so the decedent could not read it. This is sheer speculation, given the unavailability of the evidence.

As to the vehicle manufacturers, plaintiff's claim of alternative liability is insufficient as well. Trucks are not generic products posing identification difficulties. Plaintiff admits she cannot identify the particular vehicle which was equipped with the subject wheel assembly. In addition, she cannot prove that the wheel was used as original equipment on any of the trucks at decedent's work place. The defendant vehicle manufacturers are not in the business of making three-piece rims. Though a vehicle manufacturer may be held liable for damages caused by defective component parts supplied by another entity, *Comstock* v *General Motors Corp*, 358 Mich 163; 99 NW2d 627 (1959), this duty has not yet been extended to component parts added to a vehicle subsequent to distribution. Assuming the existence of a defect, plaintiff must "trace that defect in the hands" of the defendant. *Caldwell* v *Fox*, 394 Mich 401, 410; 231 NW2d 46 (1975). "The threshold requirement of any product liability action is identification of the injury-causing product and its manufacturer." *Abel*, 418 Mich 327. Failure of a component not supplied by the manufacturer does not give rise to liability on the manufacturer's part. *Antcliff* v *State Employees Credit Union*, 95 Mich App 224, 231-233; 290 NW2d 420 (1980), *aff'd* 414 Mich 624; 327 NW2d 814 (1982).

Concert of Action

Plaintiff next argues that the trial court erred in granting summary judgment in favor of defendants on plaintiff's concert of action claim. Plaintiff argues that she submitted documentary evidence of the joint efforts and conscious parallelism in the wheel industry, and that defendants acted to direct government inquiry away from themselves.

Because the trial court relied on affidavits outside the pleadings in granting summary judgment, we again review the summary judgment as one granted pursuant to GCR 1963, 117.2(3). A motion for summary judgment pursuant to

this court rule should not be granted unless it is impossible for the claim asserted to be supported by evidence at trial. *Rizzo* v *Kretschmer*, 389 Mich 363; 207 NW2d 316 (1973).

A plaintiff may proceed on the theory of concert of action if he can prove "that all defendant acted tortiously pursuant to a common design". *Abel*, 418 Mich 338. "Express agreement is not necessary, and all that is required is that there be a tacit understanding." Prosser, Torts (4th ed), §46, p 292. "A concert of action case does not require that the plaintiff be unable to identify the specific defendant who caused his injury." *Abel*, 418 Mich 338. Rather, each defendant "is jointly and severally liable for the entire amount of damages, although he may be entitled to contribution from his fellow tort feasors." *Abel*, 94 Mich App 73. "Even if defendant caused no harm himself, he is liable for the harm caused by his fellows because all acted jointly." 94 Mich App 73. ". . . [T]o state a cause of action, a plaintiff need only allege that the defendants were jointly engaged in tortious activity as a result of which the plaintiff was harmed." *Abel*, 418 Mich 338, citing *Walters* v *Sargent*, 390 Mich 775; 210 NW2d 315 (1973), *adopting partial dissent* in *Walters* v *Sargent*, 46 Mich App 379, 384; 208 NW2d 207 (1973).

In this case, the trial court did not give this claim the individual consideration it deserved, but disposed of it on the same basis as the alternative liability claim—failure to identify the source of the wheel. As noted above, the identification problem is not a *sine qua non* of a concert of action claim. Each defendant who acted jointly and tortiously is liable, even though his conduct was not the direct cause of the injury. Thus, in the context of this case, we hold that it does not matter if the party causing the injury in fact is not joined in the concert of action claim, since all those acting

in concert, named and unnamed defendants, are jointly and *severally* liable for the entire harm. *Abel*, 94 Mich App 73.[1]

As discussed below, plaintiff is entitled to recover on a concert of action theory if she can prove that all three-piece truck wheel assemblies are defective, or that the defendant wheel manufacturers breached their duty to warn of a danger posed by their products, and that defendants acted jointly in marketing defective products and/or failing to adequately warn those in contact with them. Evidence supporting her claim would preclude summary judgment. *Rizzo*, *supra*.

In order to prove her concert of action claim against the wheel manufacturers, plaintiff must first show that they acted negligently. "It is now established that the manufacturer and wholesaler of a product, by marketing it, owe a legal duty to those affected by its use." *Moning* v *Alfono*, 400 Mich 425, 433; 254 NW2d 759 (1977). A manufacturer's duty also includes dissemination of warnings or instructions "appropriate for the safe use of its products". *Antcliff*, 414 Mich 638. Defendants in this case had this duty towards those in contact with three-piece wheels.

Plaintiff submitted an affidavit and other proof to prove the wheels defective and that defendants were aware of the numerous incidences of death and injury resulting from wheel explosions. The defendants argued that their products are safe when used properly, and that they took measures to warn those working with the wheels. These arguments relating to the reasonableness of defendants' conduct are for the

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[1] Although each defendant tortfeasor who acts in concert is jointly and severally liable, the plaintiff may join others in the suit who also engaged in such conduct. GCR 1963, 206.1, and defendants may seek contribution after judgment. MCL 600.2925a; MSA 27A.2925(1); *Abel*, 94 Mich App 73. The defendant may also implead nonjoined tortfeasors as third party defendants and seek contribution. GCR 1963, 204.

trier of fact. *Smith* v *E.R. Squibb & Sons*, 405 Mich 79, 88-90; 273 NW2d 476 (1979); *Dunn* v *Lederle Laboratories*, 121 Mich App 73, 79-80; 328 NW2d 576 (1982), *lv den* 417 Mich 1098 (1983).

Plaintiff also submitted proof to show the defendant wheel manufacturers acted jointly, pursuant to a common design. First, although defendants are correct insofar as the OSHA petition campaign cannot be viewed as tortious activity, the same activity evidences an awareness on the part of the wheel industry *as a whole* of the gravity of the problem. Moreover, if it was feasible for employers to warn and train their employees as to the danger of multi-piece wheels, then it would have been equally feasible for the wheel manufacturers to assist in doing the same. Instead, they proposed a government role in the process to relieve themselves of the burden. It is noteworthy that the decedent's accident occured a short time before OSHA finally promulgated the regulation urged by defendants. Furthermore, the adquacy of the manufacturers' warnings is a question of fact for the jury. *Dunn*, *supra*, p 80. Here, it is not clear from the record whether plaintiff had any warning whatsoever from the manufacturer of the wheel, or that any of the defendant wheel manufacturers were in the practice of supplying warnings to those affected by the use of their products.

Second, plaintiff provided evidence that the defendant wheel manufacturers were aware of the dangers posed by mismatch of component parts. Rather than change the design of the components themselves, they composed charts to show which products were safely interchangable and which were not. Again, there was no indication that such a chart found its way into the decedent's hands.

Third, plaintiff might submit proofs at trial that *all* three-piece rims pose risks which are "unreasonable in light of

the foreseeable injuries". *Owens* v *Allis-Chalmers Corp*, 414 Mich 413, 425; 326 NW2d 372 (1982). The OSHA petition activity was, arguably, a cooperative effort by the wheel manufacturers to create a regulatory buffer and avoid responsibility for those risks. The venture indicates a tacit understanding and mutual encouragement to refrain from taking more direct steps to prevent the danger.

Although plaintiff submitted sufficient proof to survive a motion for summary judgment on her concert of action claim against the wheel manufacturers, she did not do so with respect to AMF. There was no proof that defendant AMF acted pursuant to a common design of the other defendants prior to sale of its wheel manufacturing division in 1959. Thus, the trial court was correct as to AMF, but erred in granting summary judgment pursuant to GCR 1963, 117.2(3), in favor of the other wheel manufacturers.

Plaintiff's concert of action claim against the vehicle manufacturers is not supported by evidence showing they acted jointly with the wheel manufacturers. The purchase of wheels for use as original equipment on their vehicle is not sufficient for a finding of concert of action. "One who innocently, and carefully, does an act which furthers the tortious purpose of another is not acting in concert with him." *Prosser, supra*, p 292. Thus, the grant of summary judgment for defendant vehicle manufacturers was proper.

Leave to Amend

Plaintiff finally argues that the trial court erred by denying plaintiff leave to amend her complaint. In her proposed third amended complaint, plaintiff sought to add allegations of civil conspiracy. Plaintiff also submitted a proposed fourth amended complaint, alleging "enterprise liability".

Leave to amend a complaint "shall be freely given when justice requires". GCR 1963, 118.1; *Midura* v *Lincoln Con-*

solidated Schools, 111 Mich App 568, 562; 314 NW2d 691 (1981). The grant or denial of the motion to amend is within the discretion of the trial court. *McCalla* v *Richard Ellis*, 129 Mich App 452; 341 NW2d 525 (1983). Furthermore, summary judgment does not preclude amendment of the complaint. *Midura, supra*, p 56. However, failure to grant leave to amend is not reversible error where the pleadings as sought to be amended still fail to state a claim. *Zimmerman* v *Stahlin*, 374 Mich 93, 96; 130 NW2d 915 (1964); *Crosby* v *City of Detroit*, 123 Mich App 213, 223; 333 NW2d 557 (1983).

Conspiracy

"A conspiracy is a combination of two or more persons, by some *concerted action*, to accomplish a criminal or unlawful purpose, or to accomplish a purpose not unlawful by criminal or unlawful means." *Fenestra* v *Gulf American Land Corp*, 377 Mich 565, 593; 141 NW2d 36 (1966) (emphasis added). An allegation of civil conspiracy, standing alone, is not actionable, *Magid* v *Oak Park Racquet Club Assocs, Limited*, 84 Mich App 522, 529; 269 NW2d 661, *lv den* 404 Mich 805 (1978).

In this case, plaintiff's proposed third amended complaint contained no allegation that defendants employed unlawful methods to attain a lawful end. The group activities listed by plaintiff were entirely lawful. On the other hand, the unlawful purposes alleged were largely polemic restatements of plaintiff's concert of action allegations. Plaintiff's conspiracy claim boiled down to the allegation that the defendants "conspired to act in concert". This claim lacks meaning without an underlying tortious or criminal activity. "Concert of action" cannot be the tort or unlawful action underlying a conspiracy claim. Concert of action is itself a claim which, like conspiracy, cannot exist independently of an underlying tortious act.

Furthermore, of the specific allegations in the proposed pleadings, only one, defendants' inhibition of product indentification, approached the level of intent or agreement requisite to a conspiracy claim. Conspiracy entails "an agreement, or preconceived plan, to do an unlawful act". *Bahr* v *Miller Bros Creamery*, 365 Mich 415, 427; 112 NW2d 463 (1961). However, plaintiff's allegation of an agreement to inhibit product indentification suffers from the absence of an unlawful purpose. Plaintiff does not specify why it is unlawful to inhibit product identification in the absence of a statute requiring clear identifying marks on a product. It is not enough that plaintiff simply asserts a conclusion. *Prelesnik* v *Esquina*, 132 Mich App 341; ____ NW2d ____ (1984). Thus, the proposed pleading is legally insufficient on its face. *Fyke & Sons* v *Gunter Co*, 390 Mich 649, 660; 213 NW2d 134 (1973).

We find that the trial court did not abuse its discretion by refusing plaintiff leave to file her third amended complaint containing the conspiracy claim.

Enterprise Liability

Also, the trial court correctly denied leave to file the proposed fourth amended complaint, since enterprise liability is not recognized in Michigan. *Abel*, 418 Mich 336-337. The amended complaint would still have failed to state a claim. *Zimmerman, supra*.

This case is reversed and remanded for trial of plaintiff's concert of action claim against the wheel manufacturers, except defendant AMF. In all other respects, the judgment is affirmed.

Affirmed in part, reversed and remanded in part.

/s/ Roman S. Gribbs
/s/ Harold Hood
/s/ Richard M. Maher

APPENDIX B

Appendix B
Amended Opinion

AMENDED OPINION

STATE OF MICHIGAN
COURT OF APPEALS

THELMA COUSINEAU, Personal Representative of the Estate of MARK COUSINEAU,
Plaintiff-Appellant,

v

FORD MOTOR COMPANY, a foreign corporation, INTERNATIONAL HARVESTER COMPANY, a foreign corporation, GOODYEAR TIRE & RUBBER COMPANY, a foreign corporation, KELSEY HAYES CORPORATION, a foreign corporation, BUDD CORPORATION, a foreign corporation, FIRESTONE TIRE & RUBBER COMPANY, a foreign corporation, FRUEHAUF CORPORATION, a foreign corporation, and AMF, INC., a foreign corporation,
Defendants-Appellees.

[JAN 2 1985]
Amended Opinion
No. 69363

—Before: R.S. Gribbs, P.J., H. Hood and R.M. Maher, JJ.

R. S. Gribbs, J.

Plaintiff appeals as of right from an order granting summary judgment for defendants on her wrongful death claim, and a subsequent order denying her motion for reconsideration and denying her leave to amend her complaint. We affirm in part and reverse in part.

Plaintiff brought suit on October 29, 1980, alleging her son, Mark Cousineau (decedent), was killed on May 8, 1979, while repairing a truck tire mounted on a three-piece wheel. Decedent was an employee of Jaeger Brothers Construction Co, which owned several trucks, including four or five made by Ford, two by International Harvester, and at least one Fruehauf Trailer. In addition, Jaeger Brothers had numerous

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ufacturers exchanged information on part interchangeability so that charts could be formulated to guide mechanics on this problem.

The defendant vehicle manufacturers purchased substantial numbers of multi-piece rims for use as original equipment. The petition to OSHA indicates that 98% of all multi-piece rims sold are used as original equipment. However, there is nothing in the record to show that vehicle manufacturers, as opposed to wheel manufacturers, were involved in the OSHA petition campaign. References to defendant wheel manufacturer AMF were also absent from plaintiff's documents, since AMF sold its truck rim subsidiary ("Cleveland Welding Division") to Budd in 1959.

At the December 10, 1982, hearing on the motion for summary judgment, plaintiff argued that summary judgment would be premature, since discovery was not complete. Counsel for Goodyear replied that no amount of discovery would disclose the identity of the manufacturer of the wheel involved in the accident. In granting the motion in favor of defendants, the trial court stated, "We're not talking about a generic product that cannot be identified". Rather, the court concluded, "This is a case where the wheel that we're talking about disappeared".

Prior to the grant of summary judgment, plaintiff moved for leave to amend her complaint. She submitted a proposed third amended complaint containing an allegation of civil conspiracy, and a fourth amended complaint which advanced a claim of "enterprise liability". *Hall* v *E I DuPont DeNemours & Co*, 314 F Supp 353 (E D NY 1972). At the hearing on the motions to amend, plaintiff conceded "there's no cause of action for conspiracy unless you've got an underlying cause". Plaintiff also requested reconsideration of the grant for summary judgment.

The trial court denied leave to amend the complaint without comment. It also denied the motion for reconsideration, distinguishing *Abel* v *Eli Lilly & Co*, 94 Mich App 59; 289 NW2d 20 (1979), *aff'd* 418 Mich 311; 343 NW2d 164 (1984).

Alternative Liability

Plaintiff first contests the granting of the summary judgment for defendants on plaintiff's alternative liability claim. She argues that the theory of alternative liability applies where a plaintiff, through no fault of his own, cannot identify the specific defendant responsible for his injuries.

The trial court did not specify the court rule underlying its grant of summary judgment. It granted summary judgment because the wheel would be identifiable if it were available, basing this conclusion on plaintiff's admission and defendant's affidavit. Since the court went beyond the pleadings in reaching its decision, the judgment will be reviewed as granted pursuant to GCR 1963, 117.2(3). Under this court rule, the nonmoving party must establish that it has a case on the law and that there are some evidentiary proofs to support its allegation as to any material fact. *Durant* v *Stahlin*, 375 Mich 628, 638; 135 NW2d 392 (1965).

Substantial guidance is provided by the recent decision in *Abel*, in which the Supreme Court expressed formal approval of the theory of alternative liability. 418 Mich 329. As noted by this Court in *Greene* v *Union Optical Center*, 95 Mich App 167, 171; 290 NW2d 111 (1980), "[i]n certain situations, a plaintiff's burden of proof may be shifted to the defendants where more than one defendant has been negligent and the plaintiff is unable to prove which of the two defendants caused his injury". Prerequisite to such a shift, plaintiff must show, first, that all defendants acted tortiously; second, that plaintiff was harmed by one of the

defendants; and, third, that plaintiff, "through no fault of [his or her] own, [is] unable to identify which actor caused the injury". *Abel*, 418 Mich 331-332. Plaintiff fastens her argument onto the latter language, ignoring the policy underlying alternative liability theory. That policy was clearly stated by the Court in the *Abel* opinion:

> "[The] reason for the exception to traditional rules is to prevent the injustice of allowing proved wrongdoers to escape liability for an injury inflicted upon an innocent plaintiff 'merely because *the nature of their conduct and the resulting harm made it difficult or impossible to prove which of them has caused the harm.*' " 418 Mich 327, *citing* 2 Restatement Torts, 2nd, §433B, Comment f, p 446 (emphasis added).

In *Abel*, the plaintiffs alleged they were harmed by their consumption of synthetic estrogens. 418 Mich 318. Their inability to identify the specific manufacturer which caused the harm resulted from the inherent nature of the product. Once ingested, the medication was irretrievable for use as evidence. Also, plaintiffs alleged that defendants used "a generic marketing scheme to promote the product". 418 Mich 336. In its decision in *Abel*, this Court noted the difficulties posed by the number of defendants and by the length of time between the ingestion of the allegedly defective drug and the appearance of the damages. 94 Mich App 76.

In this case, however, the wheel assembly which gave rise to the injury did not disappear, nor was its source rendered unidentifiable by the defendants' conduct. It remained available for use as evidence and was, in fact, kept separate from the wheel inventory of decedent's employer for quite some time. Plaintiff argues that the similarity of three-piece rims renders them unidentifiable, but admits the wheel could be identified if it were available. The interchange of parts

between wheel rim manufacturers indicates only that more than one manufacturer may have made the components in question, not that the parts could not be identified. Plaintiff further contends that the identifying stamp on the product was probably obscured by dirt and corrosion, so the decedent could not read it. This is sheer speculation, given the unavailability of the evidence.

As to the vehicle manufacturers, plaintiff's claim of alternative liability is insufficient as well. Trucks are not generic products posing identification difficulties. Plaintiff admits she cannot identify the particular vehicle which was equipped with the subject wheel assembly. In addition, she cannot prove that the wheel was used as original equipment on any of the trucks at decedent's work place. The defendant vehicle manufacturers are not in the business of making three-piece rims. Though a vehicle manufacturer may be held liable for damages caused by defective component parts supplied by another entity, *Comstock* v *General Motors Corp*, 358 Mich 163; 99 NW2d 627 (1959), this duty has not yet been extended to component parts added to a vehicle subsequent to distribution. Assuming the existence of a defect, plaintiff must "trace that defect in the hands" of the defendant. *Caldwell* v *Fox*, 394 Mich 401, 410; 231 NW2d 46 (1975). "The threshold requirement of any product liability action is identification of the injury-causing product and its manufacturer." *Abel*, 418 Mich 327. Failure of a component not supplied by the manufacturer does not give rise to liability on the manufacturer's part. *Antcliff* v *State Employees Credit Union*, 95 Mich App 224, 231-233; 290 NW2d 420 (1980), *aff'd* 414 Mich 624; 327 NW2d 814 (1982).

Concert of Action

Plaintiff next argues that the trial court erred in granting summary judgment in favor of defendants on plaintiff's concert of action claim. Plaintiff argues that she submitted doc-

umentary evidence of the joint efforts and conscious parallelism in the wheel industry, and that defendants acted to direct government inquiry away from themselves.

Because the trial court relied on affidavits outside the pleadings in granting summary judgment, we again review the summary judgment as one granted pursuant to GCR 1963, 117.2(3). A motion for summary judgment pursuant to this court rule should not be granted unless it is impossible for the claim asserted to be supported by evidence at trial. *Rizzo* v *Kretschmer*, 389 Mich 363; 207 NW2d 316 (1973). The data which the trial court considers in ruling on the motion are "affidavits, together with the pleadings, depositions, admissions and documentary evidence then filed in the action or submitted by the parties". GCR 1963, 117.3; *Rizzo, supra*, p 373.

A plaintiff may proceed on the theory of concert of action if he or she can prove "that all defendants acted tortiously pursuant to a common design". *Abel*, 418 Mich 338. "Express agreement is not necessary, and all that is required is that there be a tacit understanding." Prosser, Torts (4th ed), §46, p 292. "A concert of action case does not require that the plaintiff be unable to identify the specific defendant who caused his injury." *Abel*, 418 Mich 338. Rather, each defendant "is jointly and severally liable for the entire amount of damages, although he may be entitled to contribution from his fellow tort feasors." *Abel*, 94 Mich App 73. "Even if defendant caused no harm himself, he is liable for the harm caused by his fellows because all acted jointly." 94 Mich App 73. ". . . [T]o state a cause of action, a plaintiff need only allege that the defendants were jointly engaged in tortious activity as a result of which the plaintiff was harmed." *Abel*, 418 Mich 338, citing *Walters* v *Sargent*, 390 Mich 775; 210 NW2d 315 (1973), *adopting partial dissent* in *Walters* v *Sargent*, 46 Mich App 379, 384; 208 NW2d 207 (1973).

In this case, the trial court did not give this claim the individual consideration it deserved, but disposed of it on the same basis as the alternative liability claim—failure to identify the source of the wheel. As noted above, the identification problem is not a *sine qua non* of a concert of action claim. Each defendant who acted jointly and tortiously is liable, even though his conduct was not the direct cause of the injury. Thus, in the context of this case, we hold that it does not matter if the party causing the injury in fact is not joined in the concert of action claim, since all those acting in concert, named and unnamed defendants, are jointly and *severally* liable for the entire harm. *Abel*, 94 Mich App 73.[1]

As discussed below, plaintiff is entitled to recover from defendant wheel manufacturers on a concert of action theory if she can prove that they acted tortiously pursuant to a common design and that such action proximately caused the injury. She can prove tortious activity pursuant to a common design if she establishes that the wheel manufacturers, acting jointly, breached their duty to warn of the danger posed by their products (negligence or breach of implied warranty theory). See *Smith* v *E R Squibb & Sons*, 405 Mich 79; 273 NW2d 476 (1979). She can also recover if she can prove that the wheel manufacturers, acting jointly, manufactured/marketed an unreasonably dangerous product (negligence or negligent design theory). See *Owens* v *Allis-Chalmers Corp*, 414 Mich 413; 326 NW2d 327 (1982); *Moning* v *Alfono*, 400 Mich 425; 254 NW2d 759 (1977). A showing by plaintiff that there is some evidence supporting these claims would preclude summary judgment. *Rizzo*, *supra*.

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[1]Although each defendant tortfeasor who acts in concert is jointly and severally liable, the plaintiff may join others in the suit who also engaged in such conduct, GCR 1963, 206.1, and defendants may seek contribution after judgment. MCL 600.2925a; MSA 27A.2925(1); *Abel*, 94 Mich App 73. The defendant may also implead nonjoined tortfeasors as third party defendants and seek contribution. GCR 1963, 204.

Plaintiff made a sufficient showing that defendant wheel manufacturers acted jointly in failing to warn of a danger in their products to survive their summary judgment motion. Plaintiff submitted an affidavit and other data to show that the wheels and the mismatch of wheel components posed a danger, and that the defendants were aware of the numerous incidences of death and injury resulting from wheel explosions. The record does not establish that plaintiff had any warning whatsoever from the wheel manufacturers, or that any of these manufacturers were in the practice of supplying warnings to those affected by the use of their products. Although defendants argue that their products are safe when used properly, and that they took adequate measures to warn those working with the wheels, these arguments relating to the reasonableness of their conduct are for the trier of fact. *Smith, supra,* pp 88-90; *Dunn* v *Lederle Laboratories,* 121 Mich App 73, 79-80; 328 NW2d 576 (1982), *lv den* 417 Mich 1098 (1983). By engaging in the joint OSHA petition campaign, the wheel manufacturers arguably proposed a government role to relieve themselves of their duty to warn those working with the multi-piece rims.[2]

Plaintiff provided documentation showing that the multi-piece rims manufactured/marketed by the wheel manufacturers were dangerous, and that the manufacturers knew of the danger posed by their products and the mismatch of components of their products. Plaintiff might submit proofs at trial that all three-piece rims posed risks "unreasonable in light of the foreseeable injuries". *Owens, supra,* p 425. Plaintiff also showed that, rather than change the design of

[2]Defendants are correct insofar as the OSHA petition campaign cannot be viewed as tortious activity. Nonetheless, the same activity indicates an awareness of the wheel industry as a whole of the gravity of the problem and could be interpreted as a cooperative effort to avoid responsibility for the risks posed by multi-piece rims.

the rims or the rim components, the wheel manufacturers acted jointly in exchanging information and composing charts to show which products were safely interchangeable and which were not. This conduct, as well as the OSHA petition campaign, could indicate a tacit understanding and mutual encouragement to refrain from taking more reasonable steps to prevent the danger posed by the multi-piece wheel rims.

In addition, plaintiff would have to establish that the above alleged tortious activity engaged in by the wheel manufacturers proximately caused the injury. Although the explosion of the multi-piece rim caused decedent's death in fact, the question of proximate cause is whether or not the conduct of the wheel manufacturers was so significant and important a cause that they should be legally responsible. *Moning, supra*, p 438. Although proximate cause is a question of law where there are no factual disputes, *Moning, supra*, pp 438-439, in a negligence action (which is essentially the underlying tortious activity of plaintiff's concert of action claim), any doubts about the relationship between cause and effect should be resolved by the trier of fact. *Fiser* v *City of Ann Arbor*, 417 Mich 461, 475; 339 NW2d 413 (1983). Summary judgment can only be granted if reasonable persons could not differ in finding that the wheel manufacturers' conduct was not a proximate cause of the injury. *Fiser, supra*, p 470; *Davis* v *Thornton*, 384 Mich 138, 142-146; 180 NW2d 11 (1970). Because summary judgment for defendant wheel manufacturers was not granted on this ground, we leave this question for the trial court.

Although plaintiff made a sufficient showing to survive a motion for summary judgment on her concert of action claim against the wheel manufacturers, she did not do so with respect to AMF. There was no indication that defendant AMF acted pursuant to a common design of the other

defendants prior to sale of its wheel manufacturing division in 1959. Thus, the trial court was correct as to AMF, but erred in granting summary judgment pursuant to GCR 1963, 117.2(3), in favor of the other wheel manufacturers.

Plaintiff's concert of action claim against the vehicle manufacturers is not supported by any showing that they acted jointly with the wheel manufacturers. The purchase of wheels for use as original equipment on their vehicle is not sufficient for a finding of concert of action. "One who innocently, and carefully, does an act which furthers the tortious purpose of another is not acting in concert with him." *Prosser, supra*, p 292. Thus, the grant of summary judgment for defendant vehicle manufacturers was proper.

Leave to Amend

Plaintiff finally argues that the trial court erred by denying plaintiff leave to amend her complaint. In her proposed third amended complaint, plaintiff sought to add allegations of civil conspiracy. Plaintiff also submitted a proposed fourth amended complaint, alleging "enterprise liability".

Leave to amend a complaint "shall be freely given when justice requires". GCR 1963, 118.1; *Midura* v *Lincoln Consolidated Schools*, 111 Mich App 558, 562; 314 NW2d 691 (1981). The grant or denial of the motion to amend is within the discretion of the trial court. *McCalla* v *Richard Ellis*, 129 Mich App 452; 341 NW2d 525 (1983). Furthermore, summary judgment does not preclude amendment of the complaint. *Midura, supra*, p 56. However, failure to grant leave to amend is not reversible error where the pleadings as sought to be amended still fail to state a claim. *Zimmerman* v *Stahlin*, 374 Mich 93, 96; 130 NW2d 915 (1964); *Crosby* v *City of Detroit*, 123 Mich App 213, 223; 333 NW2d 557 (1983).

Conspiracy

"A conspiracy is a combination of two or more persons, by some *concerted action*, to accomplish a criminal or unlawful purpose, or to accomplish a purpose not unlawful by criminal or unlawful means." *Fenestra* v *Gulf American Land Corp*, 377 Mich 565, 593; 141 NW2d 36 (1966) (emphasis added). An allegation of civil conspiracy, standing alone, is not actionable; *Magid* v *Oak Park Racquet Club Assocs, Limited*, 84 Mich App 522, 529; 269 NW2d 661, *lv den* 404 Mich 805 (1978).

In this case, plaintiff's proposed third amended complaint contained no allegation that defendants employed unlawful methods to attain a lawful end. The group activities listed by plaintiff were entirely lawful. On the other hand, the unlawful purposes alleged were largely polemic restatements of plaintiff's concert of action allegations. Plaintiff's conspiracy claim boiled down to the allegation that the defendants "conspired to act in concert". This claim lacks meaning without an underlying tortious or ciminal activity. "Concert of action" cannot be the tort or unlawful action underlying a conspiracy claim. Concert of action is itself a claim which, like conspiracy, cannot exist independently of an underlying tortious act.

Furthermore, of the specific allegations in the proposed pleadings, only one, defendants' inhibition of product identification, approached the level of intent or agreement requisite to a conspiracy claim. Conspiracy entails "an agreement, or preconceived plan, to do an unlawful act". *Bahr* v *Miller Bros Creamery*, 365 Mich 415, 427; 112 NW2d 463 (1961). However, plaintiff's allegation of an agreement to inhibit product identification suffers from the absence of an unlawful purpose. Plaintiff does not specify why it is unlawful to inhibit product identification in the absence of a statute requiring clear identifying marks on a product. It is

not enough that plaintiff simply asserts a conclusion. *Prelesnik* v *Esquina*, 132 Mich App 341; 347 NW2d 226 (1984). Thus, the proposed pleading is legally insufficient on its face. *Fyke & Sons* v *Gunter Co*, 390 Mich 649, 660; 213 NW2d 134 (1973).

We find that the trial court did not abuse its discretion by refusing plaintiff leave to file her third amended complaint containing the conspiracy claim.

Enterprise Liability

Also, the trial court correctly denied leave to file the proposed fourth amended complaint, since enterprise liability is not recognized in Michigan. *Abel*, 418 Mich 336-337. The amended complaint would still have failed to state a claim. *Zimmerman, supra*.

This case is reversed and remanded for trial of plaintiff's concert of action claim against the wheel manufacturers, except defendant AMF. In all other respects, the judgment is affirmed.

Affirmed in part, reversed and remanded in part.

/s/ Roman S. Gribbs
/s/ Harold Hood
/s/ Richard M. Maher

APPENDIX C

ORDER

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 24th day of June in the year of our Lord one thousand nine hundred and eighty-five.

Present the Honorable
G. MENNEN WILLIAMS,
Chief Justice
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DOROTHY COMSTOCK RILEY,
Associate Justices

75652
75653
75734

THELMA COUSINEAU, Personal Representative of the Estate of MARK COUSINEAU,
Plaintiff-Appellee,

v

FORD MOTOR COMPANY, a foreign corporation, INTERNATIONAL HARVESTER COMPANY, a foreign corporation, KELSEY HAYES CORPORATION, a foreign corporation, FRUEHAUF CORPORATION, a foreign corporation, and AMF, INC., a foreign corporation,
Defendants,
and
GOODYEAR TIRE & RUBBER COMPANY, a foreign corporation, THE BUDD COMPANY, a foreign corporation, and FIRESTONE TIRE & RUBBER COMPANY, a foreign corporation,
Defendants-Appellants.

SC: 75652, 75653, 75734
COA: 69363
LC: 80-039-185-NP

Appendix C
Order

On order of the Court, the applications for leave to appeal are considered, and they are DENIED, because we are not persuaded that the questions presented should now be reviewed by this Court.

STATE OF MICHIGAN — ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 24th day of June in the year of our Lord one thousand nine hundred and eighty-five.

(s) Jacqueline B. MacKinnon
Deputy Clerk

APPENDIX D

EXHIBIT 48

HISTORY OF TRUCK RIMS

Late 1890's - The clincher rim was used almost exclusively until 1905. It gradually declined in usage with Ford being the only user in 1916. It's usage for new cars was dropped by the late 1920's.

1905 - Multi-piece rims were introduced for use with the new tires with inextensible beads which could not not be stretched over the rim flanges. All rims in the U. S. for passenger or larger vehicles were constructed with a removable flange until approx. 1920.

1909 - Firestone began manufacture of multi-piece passenger rims. From 1903-1909 Firestone rims were manufactured to their specifications by outside suppliers.

1920 - One-piece drop center type rims were introduced into the U.S. from Europe for use with the smaller and more flexible passenger and agricultural tires. The larger and stiffer truck tires continued to require rims with removable flange. Clev-Weld, Goodyear, Kelsey-Hayes and Jaxon, in addition to Firestone, all made multi-piece truck rims in this era.

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1930-45 - During this period three basic multi-piece rim designs were produced in the U. S. The first utilized a split side ring assembled as a snap ring into the rim book. This type was produced by Clev-Weld and Goodyear. The second utilized a continuous side ring that was held in place by a split locking ring that snapped into the ring book and was referred to as the Firestone type "R" rim. The third design had a continuous side ring with two crescent notches that allowed the assembly of the parts and was known as the Firestone type "RH" rim.

Firestone also manufactured a line of semi drop center rims known as the type "RHP" for light truck application. This design incorporated the same type side ring as the "RH" type and is still in use today.

Each of these rims was basically a continuous cylinder with a fixed flange on and with a hook on the opposite end for the attachment of the removable flange. The diameter of the rim being slightly smaller than the tire which in usage allowed some motion of the tire on the rim resulting in chafing of thetire sidewall.

1946-48 - Firestone introduced the type "R5°" which was an improvement to the type "R" rim. This rim design had a 5° ramp on each side which allowed the tire to be wedged tight when inflated. To provide this ramp support the split lock ring was designed with a long toe. This new design eliminated side wall chafing and is still in use today, known as the 5° Radial Commander.

Firestone also introduced the "RH5°" to succeed the "RH" rim. This was a two-piece design consisting of a continuous rim base and a continuous side ring which hooked in the semi drop center area. The same crescent notch principle was utilized in its design to permit the assembly of the parts. However, due to incorporating the 5° bead support ramp in the design, the appearance of the side ring differed from its predecessor. Both Firestone and the Kelsey-Hayes Company acquired patents relating to the "RH5°" rim design and over the next quarter of a century 20 to 25 million "RH5°" wheels were manufactured by the Budd Company, Kelsey-Hayes Company, Motor Wheel Corporation and Firestone. During portions of that period rim bases were manufactured by Budd, Kelsey-Hayes and Firestone and siderings were manufactured by the latter two companies. The "RH5°" wheels were purchased by all of the major manufacturers of medium trucks and other vehicle manufacturers that required these wheel

sizes. The O.E. manufacturers included General Motors, Ford, Chrysler, International Harvester and Studebaker.

1950 - Industry joint development with the military of a 20 x 7.5 military standard wheel utilizing a split side ring which snapped over the rim hook. Clev-Weld, Firestone and Goodyear all tooled to produce the rim and ring.

Firestone announced a new light-weight, high-strength alloy DA5° rim in the 7.5 width in both 20 and 22" diameters. This rim assembly had a split side ring which snapped over the rim hook. This rim was discontinued in 1957.

1955 - Firestone developed a tubeless truck tire that could be mounted on a one-piece drop center rim. In order to accomplish this a radical change in tire construction was made using a 15° bead design which permitted a low rim flange. Firestone obtained a patent on this principle and then made it available, royalty-free, in an effort to make it readily acceptable to the industry.

Firestone, Budd, Kelsey-Hayes and Goodyear all began manufacturing these rims. By this time both Jaxon and Clev-Weld were out of business, Budd having purchased the Clev-Weld equipment.

All major truck manufacturers adopted tubeless as their standard from approx. 1956-1961. With 90% of truck buyers insisting on tube type, O.E. manufacturers reinstated tubed type tires utilizing multi-piece rims as standard - and this is still true today. Buses stayed standard on tubeless largely due to the efforts of the tire companies.

1957 - Firestone announced the N5° light-weight rim in the 7.5 width in 20 and 22" diameter. This was the same rim as the DA5° rim except regular 1010 steel was used.

Firestone introduced the two piece "FL" light weight rim in the 7.5" width for the trailer industry. This design had a split side ring which assembled as a snap ring into the rim hook.

1962 - Both Budd and Firestone introduced a new line of light weight 2-piece and 3-piece rims. Budd called their line the BW and Firestone designated theirs as the FL-CR line. In both cases the rim base would either accept a split side ring or a continuous side ring with a short toed lock ring. Budd and Firestone parts were not interchangeable.

Budd discontinued their BW line in 1967. Goodyear began manufacturing the Firestone FL-CR line in 1968 as did Budd in 1975.

1963-64 - Firestone began the manufacture of the Goodyear type "LB" rim line. All components being interchangeable with Goodyears. Budd also began manufacturing this type rim in 1975.

1967 - Budd began manufacture of their Budd Duo 16 x 5.50 wheel for light trucks. This rim was rolled from strip and first utilized the Goodyear LTS split side ring. Budd later produced their own "C" shaped split side ring to go with the rim. This rim replaced the Firestone RHP rim at Ford and the Goodyear LTS rim at Chrysler, IHC and Jeep.

1969 - Firestone made available the "XL" rim as the successor to the RH5° rim where loads and inflations demanded higher capacities. The "XL" is a semi drop center rim utilizing a continuous side ring fitted with crescent notches which hooks over a gutter which is larger in diameter than the tire bead.

The state of Utah in August 1969 held hearings on alleged accidents involving RH5° rims. Subsequently, it was learned that other multi-piece rims were involved as well. It was apparent that the cause of accidents were primarily associated with poor maintenance and improper shop practices. October of the same year NHTSA initiated an investigation of "RH5°" rims which continued until 1974.

1970 - Many major west coast based commercial carriers and virtually all bus fleets have become standardized on tubeless tires. 85% of users remain standard on tubed type tires requiring multi-piece rims.

1973 - Firestone introduced their first forged aluminum tubeless truck wheel in the 22.5 x 7.50 size. The 22.5 x 8.25 size was introduced in 1975 and the 24.5 x 8.25 size in 1976.

1974 - NHTSA announced in April that they had terminated their investigation of rim or wheel failures on the multi-piece "RH5°" truck wheel. They did not determine the presence of a safety defect. A national poster campaign and public advisory campaign was initiated to advise service personnel of safe procedures in handling all types of multi-piece rims.

In August Kelsey-Hayes began furnishing to Chevrolet and GM T&C a one-piece drop center wheel size 16 x 6.5L for use with tube type tires replacing the Firestone 16 x 6.00G two-piece rim which employed a split side ring on single wheel applications.

Appendix D
Exhibit 48

1976 - The Rubber Manufacturers Association (RMA) submitted a petition to OSHA requesting establishment of a safety standard for servicing of multi-piece truck rims. This proposed standard was scheduled for release in January of 1979 but has been held up at NHTSA's request.

In February of 1976 Firestone began furnishing to Chevrolet and GM T&C a one-piece drop center wheel size 16 x 6 KS for use with tube type tires, replacing the Firestone 16 x 5.50 RHP two-piece rim which employed a continuous side ring with crescent notches for assembly and disassembly. This wheel was for dual wheel applications.

1978 - In February 1978 Firestone began supplying to Ford a one-piece drop center wheel size 16 x 6K for use with tube type tires, replacing the Budd Duo two-piece 16 x 5.50 on dual wheel application.

In February Budd began supplying to Ford and Chrysler a one-piece drop center wheel size 16 x 6K for use with tube type tires, replacing the Budd Duo two-piece 16 x 5.50 on single wheel applications.

In approx. May Budd began supplying Chrysler a dual wheel utilizing the 16 x 6K rim, again replacing the two-piece Budd Duo size 16 x 5.50.

1978 (cont'd.)

In June of 1978 the Insurance Institute submitted a petition to NHTSA to initiate an investigation of multi-piece truck wheels and since they knew of 161 injuries or deaths that had occurred during the servicing of truck tires over a span of 18 years.

September 19, 1978 request received from Congressman John E. Moss to furnish information regarding accidents involving multi-piece rims.

September 29, 1978 Ms. Joan Claybrook advised the Insurance Institute that NHTSA had reinvestigated the agencies past decisions and based on recently acquired data (from the Insurance Institure) have concluded an investigation is warranted. They would initiate an engineering analysis, solicit new information from both the public and the wheel manufacturers "and because of the inherent danger associated with multi-piece truck and bus wheels", she had instructed her staff to commence a rule-making proceeding.

October 10, 1978 NHTSA requested in writing data regarding quantities produced - by type, by year, complete records of all known or purported accidents, status of RH5° last production, estimates of quantities of RH5° in use today, estimates of average life of products, past recalls and reasons for same,

1978 (cont'd.)

a record of all design changes, copies of all correspondence between Firestone and its customers relating to postponed Ross' hearings, and the recent Insurance Institute for Highway Safety petition to NHTSA, identification of all manufacturers of RH5° components, and, finally, our analysis of the cause of multi-piece separations in the accidents listed.

1979 - January 10th. Mr. Fred Koch, Crash Avoidance Division of NHTSA, announced proposed rulemaking expected in 30 days and final rulemaking sometime in 1980.

TODAY'S STATUS

We estimate approximately 43 million multi-piece rims and wheels are presently in service on medium and heavy truck applications of which about 2,900,000 are RH5° wheels. Our records indicate that approx. 70 per cent of all new trucks and trailers being built today are on tubed tires requiring multi-piece rims per customer demand.

We also believe there are in excess of 10 million multi-piece rims still in use on light trucks. All new production since 1978 has been on one-piece drop center rims whether tubed or tubeless.

The economic impact of a mandated switch from multi-piece rims and tubed tires to one-piece tubeless and tubeless tires will be substantial. It is estimated that the average cost increase for tubeless would be 15% with some applications increasing as much as 40%.

We estimate a current value of $8 billion on the estimated 43 million medium and heavy truck tires currently in use. In addition, there are over 13 million of these tires recapped each year which have an estimated carcass value of $700 million.

It should be pointed out that the same energy is contained in a tubeless tire as in a tubed tire and if improperly serviced a serious accident can result.

On simple reflection, it is obviously recognizable that a tire is a pressure vessel and when fully inflated contains a considerable amount of potential energy. Therefore, both the tires and rims must be carefully engineered to safely retain this energy. When you consider that the 43 million tube type tires in use on the larger trucks are probably taken apart and reassembled once a year, either to replace a worn out tire or to make a repair, the number of accidents known to occur is an extremely low probability event.

We feel the solution to the problem is the incorporation of the proposed OSHA standard to insure that proper procedures are employed in the dismounting and reassembly of tires on all types of rims, including multi-piece. The vast majority of all accidents occurring to date have been shop related and could have been avoided had proper shop practices been employed.

DPZ:ej
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APPENDIX E

Appendix E
Exhibit 26

EXHIBIT 26

We make a vital vehicle component which is a metal product with an undefined, but limited, useful life. The parts are inherently dangerous both on the highway and in the shop. When in use the dangerous condition is often masked. We know that these parts, especially old and damaged parts, sometimes catastrophically cease to serve their intended purpose. The time at which the usefullness ceases is dependent on chance, service procedures, maintenance, proper use of tools, and the use, abuse and mis-use of which the parts have been subjected during their lifetime. When this happens, there may be a social loss and/or a property loss to the user, the involved user or to interested or disinterested bystanders and a financial loss to Goodyear.

In the eyes of the user community, the part is a secondary component. It is a sturdy, heavy part, made of steel. He, therefore, thinks it has an unlimited useful life. He does not recognize the possible dangers associated with the product. There is no significant economic reason to replace an old with a new part, other than tubeless, since there has been no improvement in the state of the art.

We have expert knowledge with regard to maintenance. Such information is published, but the information may not reach the involved user. If it does, he apparently doesn't see any reason for it. We do not follow up published information with personal contact to show how and the reason why.

We have expert knowledge with regard to serviceability (possibly negative type of knowledge). Such information is not detailed in our publications. The involved user cannot tell a "good" part from a "bad". He doesn't believe the part won't function (provide support for the tire). He doesn't believe it will endanger him. Even if he feels it is unserviceable, he may not be able to replace it due to owner or his bosses instructions; or a replacement may not be available. He may be willing to take a chance because he can't afford a new rim, or he's in a hurry.

Solution: Improve level of knowledge of user regarding need for maintenance, maintenance procedures and how to determine serviceability. Eliminate the problem parts.

Why should a user discard old, bent, worn, corroded and cracked wheel/rim parts when they appear to continue to serve the purpose intended?

1. Safety
   prevent social loss
   prevent liability loss > but chance of accident is small

Why should he properly maintain present parts? (remove rust, keep painted, proper use of tools)

1. Safety
2. Lengthen part life, but it takes time

Appendix E
Exhibit 26

Will a new part lengthen useful life of tire or vehicle? Reduce downtime? Lower operating costs? Enhance performance in any way? Improve appearance? (probably no to all of these)

Why do we care about resolving this matter?

1. Escape criticism from Arkon
2. CTA
3. Reduce liability
4. Threat of government pressure
5. Avoid bad press
6. For the good of society
7. Increase sales

What could we do?

1. Recall
2. Advisory to alert the public to danger re:
   - DOT
   - Industry association
   - Goodyear

   or
3. Sales campaign
4. Education

   plus

CONFIDENTIAL
Pursuant to Court Order in MDL 182,
Dist. Ct., W.D.MO.

What would happen?

1. Any positive action to get parts out of use will probably result in more liability suits and higher damage awards, but at the same time should reduce the number of accidents.
2. An intensive sales/education campaign with first hand contact would probably result in the scrapping of more parts than advisory and may be even a recall.
3. We would have to provide replacements through our distributor organization.
4. We could be subject to criticism from our customers and others in the industry.

How could we do it?

1. Solicit advice from DOT - Sproale to handle contacts 1 on 1.
2. Discussion with others in industry - staff level contacts.
3. Counsel from Goodyear - Lincoln and Dohnal with counterparts.
4. Formulate sales/education campaign - engineering define maintenance and serviceability, sales prepare distribution program (special old or obsolete part trade-in incentive; premium awards; etc?)

   Recall, advisory = 1,2,3
   Sales, education campaign = 1,2,3,4

0020019

APPENDIX F

EXHIBIT 35

SUMMARY

SEP 23 1976
R E LEE

MULTIPIECE RIM MANUFACTURERS
Meeting of September 13,1976
Romulus, Michigan

Attending:

Wm. Krauss	-	Budd
H. Foster	-	Budd
R. J. Lee	-	Firestone
W. Freivogal	-	Firestone
M. Lincoln	-	Motor Wheel
D. Dohnal	-	Motor Wheel
J. McCuen	-	Kelsey-Hayes

EXHIBIT #35

1. RMA Petition

The meeting opened with a discussion of the meeting with Congressman Steiger and our Washington representatives. Steiger was receptive to the RMA petition and has written Mr. Corn of OSHA requesting action. (copy of Steiger's letter attached). Firestone is attempting to gain the support of Senator Stafford of Vermont.

Following discussion of the need for further support of the RMA petition, it was agreed to proceed in doing so. Krauss advised that he met with Calvin of TTMA who recommended an approach to ATA. If ATA would support the petition, TTMA would, in all probability support it also. Krauss agreed to approach ATA and the Western Highway Institute.

56-271

Regarding other organizations, McCuen and Dohnal are to approach the Insurance Institute for Highway Safety ar Bradford of Firestone is to be asked by McCuen to set up an ap-

BEST AVAILABLE COPY

Appendix F
Exhibit 35

Motor Wheel will again survey its company for an established contact with the National Safety Council and if none exists, McCuen will take on the task.

Each of the companies will also contact their insurance carrier's for support.

2. Trade Association

The objectives of a possible trade organization were discussed and are:

1. Promote the safe use of interchangeable components through technical committees.
2. Create a litigation data bank to assist in the defense of products litigation.
3. Monitor federal legislation and regulation activity in areas of common interest.
4. Promote more effective means of distribution of safety literature in the field, including product labelling.
5. Monitor state legislation and regulation activity in areas of common interest.

The consensus was that the first four items were matters of particular interest but that a formal organization was needed only for Item 3. It was concluded that creating a new

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Multipiece Rim Manufacturers Meeting of 9/...
Page Three

organization was not justified but that further consideration should be given to utilizing either the Tire and Rim Associatio or the RMA for these purposes. J. Hutchinson of Goodyear is to bring the matter before the RMA executive committee at their meeting in late September.

3. Rim Labelling

Discussion of whether labelling is necessary, adequate or possibly dangerous followed. Firestone has commissioned communications and behavioral scientists to review the subject in depth.

J. F. McCuen

APPENDIX G

Appendix G

Firestone's Interoffice Memo

FIRESTONE'S INTEROFFICE MEMO

Firestone

INTEROFFICE

DATE AUGUST 23, 1976

TO Mr. C. W. RIFFEY FROM D. P. ZART

REFERENCE

SUBJECT

Please call Bob Darleith at Kaiser Wheel, Corbeth Q. C. Manager, advised Mr. Blate 8/13 that they had the go-ahead but on the warning labels. We must step them.

CONFIDENTIAL

They are also establishing 7-year replacement parts on Job Master Rim Assembly. Also, are looking at establishment of life on all rim and wheel components.

78-255

D. P. ZART

COUSINEAU

AUG 26 1976

8/24

1900 SEVENTY FIVE YEARS OF QUALITY AND SERVICE 1975

APPENDIX H

Appendix H

Firestone Correspondence

FIRESTONE CORRESPONDENCE

Firestone

May 11, 1976

Jack Bradley, Esq.
The Budd Company
12141 Charlevoix
Detroit, Michigan 48215

Re: Rim & Wheel Warnings

Dear Jack:

As we have discussed in the past, since the Grimes decision we have agonized over the wisdom of attempting to place some form of instructional or warning label on multi-piece truck wheels and rims.

At one point we were ready to go forward with such a program, recognizing, however, that in doing so we would risk embarrassing existing product cases and future cases involving rims which do not have labels, as well as the fact that it is probably impossible to compose a warning which some court or jury will not hold incomplete, improperly placed, or otherwise inadequate.

We accordingly consulted with Professor John Pacilio of Kent University on this subject. Dr. Pacilio is a psychologist who specializes in the field of communications. After some research, Professor Pacilio has tentatively concluded that an attempt to teach tire mechanics by imprinting or labeling some instructional or warning material on the components themselves would not only prove meaningless, but could well prove an affirmatively dangerous practice. In fact, Dr. Pacilio makes some compelling and seemingly irrefutable arguments in support of his position.

My concern is that companies may be taking different positions on this subject and embarrass each other and the industry in general. For example, I would hate to be confronted by a plaintiff's lawyer with another company's warning if my product did not have one. Alternatively, if I am, I would be compelled to argue its inadequacy and affirmatively dangerous nature, which would not inure to anyone's benefit.

B 503

EXHIBIT 3

I would hope that we could meet as an industry to discuss this matter. May I have your thinking on such a meeting?

Yours very truly,

Joseph Edward Downs
Assistant Counsel

JED:mc

cc: Mr. C. W. Rippey
William M. Freivogel, Esq.

COUSINEAU

E 504

APPENDIX I

Appendix I
Exhibit 28

EXHIBIT 28

Firestone

July 29, 1974

Aluminum Company of America
1600 Harvard Avenue
Cleveland, Ohio 44105

Attention: Mr. David Kerr

The Budd Company
12141 Charlevoix
Detroit, Michigan 48215

Attention: Messrs. Ron Stasch
Jack Bradley

The Goodyear Tire & Rubber Company
1144 East Market Street
Akron, Ohio 44316

Attention: Messrs. J. V. [illegible]
[illegible] Derbeth

COUSINEAU

RECEIVED
JUL 31 1974

Kelsey-Hayes Company
38481 Huron River Drive
P. O. Box 98
Romulus, Michigan 48171

B 5897

Attention: Messrs. John F. McCuen
Douglas MacIntyre

Re: Industry Meeting on
Duty to Warn Literature

Gentlemen:

Since Mr. Downs' letter to you dated July 26, 1974, arrangements have been made through Mr. Claude Dykes of the Tire & Rim Association for the meeting concerning the above captioned matter to be held at their Offices on August 6th at 10:00 A.M.

Already H Foster on P/L Ltr Budd
Document not to attend. Will be - one
Name of Firestone pers

EXHIBIT #28

The Tire & Rim Association is located at 3200 West Market Street in the building directly West of the Hilton Inn West. Please contact me if you desire any hotel reservations made for the evening prior to the meeting (216: 379-6590).

Sincerely,

Linda L. Pawling

(Mrs.) Linda L. Pawling, Secretary to
Joseph Edward Downs

Joseph Edward Downs
Assistant Counsel

cc: Messrs. A. C. Smith —— Firestone Steel Products Company
E. W. Blate —— Firestone Steel Products Company

William M. Freivogel, Esq.
Messrs. Ross, Hardies, O'Keefe, Babcock & Parsons
One IBM Plaza
Chicago, Illinois

COUSINEAU

B 5898

APPENDIX J

Appendix J

Correspondence Re: Multi-piece Rims

CORRESPONDENCE RE: MULTI-PIECE RIMS

KELSEY-HAYES COMPANY
ROMULUS, MICHIGAN 48174

JOHN F. McCUEN
COUNSEL

313-941-2000

December 6, 1976

Mr. W. R. Krauss, General Manager
Wheel & Brake Division
The Budd Company
12141 Charlevoix Avenue
Detroit, Michigan 48215

Mr. Robert E. Lee
Division Engineer
Firestone Steel Products Company
Akron, Ohio 44301

Mr. Max J. Lincoln
Director of Product Safety & Reliability
Motor Wheel Corporation
1600 North Larch Street
Lansing, Michigan 48914

COUSINEAU

Re: Multi-Piece Rims

Gentlemen:

Charlie Rippey and Bob Lee of Firestone and I met with Mac Lovell, Executive Director of RMA on December 2, 1976 to discuss RMA representation of truck rim manufacturers and the status of the RMA petition at OSHA.

RMA Representation

RMA's By-laws have recently been amended to provide for membership by manufacturers of rubber and related products. Their attorneys have advised that representation of rim manufacturers would be within the scope of the new By-laws. (copy attached).

If rim manufacturers were to join, each company would become a member of RMA and an RMA division would be formed to serve our needs. An RMA staff member would be assigned to this division and to its committee

Appendix J
Correspondence Re: Multi-piece Rims

functions and would serve as secretary-administrator. Each division has an executive committee, which generally meets four times per year, and various special purpose committees which meet as needs arise.

In addition to meeting the parochial needs of various divisions in the organization, RMA provides guidance on a wide variety of regulatory, legislative, and general business topics of interest to the full membership. Labor relations, environmental law, taxation and industry statistics are examples of areas in which services are provided to all members.

Membership costs are determined in two ways. First is participation in overhead, which is apportioned to each division on the basis of annual cumulative sales of covered products versus annual cumulative sales of covered products for all members. Assuming total annual sales of truck rims and wheels to be $300 million, this would represent approximately 4% of annual sales of covered products by all members and our total overhead contribution would approximate $50,000 per year. This amount would be paid by member companies in the division, pro rata, based on their sales of covered products.

COUSINEAU

The other cost factor varies by the amount of committee work done and covers staff costs and expense. This could amount to another $50,000, based on the budget of other divisions in RMA.

Mr. Rippey and I believe a meeting among executives of each of our companies is needed to discuss this in further detail. A senior RMA staff person would be available to attend such a meeting to answer questions. Assuming there is interest in having this meeting, I suggest consideration be given in advance to the criteria for membership in the organization, i.e., wheel manufacturers generally, heavy duty rim manufacturers, etc. Antitrust implications are especially important in this regard as we all realize.

Appendix J
Correspondence Re: Multi-piece Rims

I will be pleased to try to schedule such a meeting and I ask to hear from each of you as to interest in doing so by early January.

OSHA Petition

Congressman Steiger followed up with Dr. Corn to see why no action had been taken since his letter. Corn has now assigned a project manager to actively study the matter and OSHA has retained the Arthur Young Company to do an economic impact analysis of the proposal regulation.

Frank Ryan of RMA will need additional information from our companies to compile an industry profile and will contact our Washington representatives for this purpose.

I wish all of you a happy holiday season.

COUSINEAU

Very truly yours,

John F. McCuen

JFM:gml
enclosure

P.S. Since dictating this, I have reviewed some economic data for our industry and believe that $100 million is much closer to total annual sales than $300 million. If I am correct, membership costs in RMA would be substantially less than estimated above.

Appendix J

Correspondence Re: Multi-piece Rims

PERSONNEL SCHEDULED TO ATTEND AD HOC INDUSTRY COMMITTEE ON SAFETY LEGISLATION (ACSL) 8-12 & 8-13-76

Motor Wheel Corporation

R. J. (Bob) Derleth - President
Paul Fair - General Manager
M. J. (Max) Lincoln - Prod. Safety
D. E. (Dave) Dohnal - Legal Counsel

The Budd Company

W. R. (Bill) Krauss - President
Roy Norton - Engineer
Tom Davenport - Legal Counsel

Kelsey-Hayes Company

R. A. (Mike) Maxwell - Vice President
~~John Liggett - Vice President-Engineering~~
John [illegible] - Legal Counsel
Do[illegible]er - Group Mgr. - Mfg. Services

COUSINEAU

Firestone

C. W. Rippey - President, Steel Products (Charlie)

J. E. Downs (Joe) - Assistant Counsel (Corporate)
D. P. Zart - General Sales Manager
A. H. (Arlie) Greber - Comptroller
Bob Bradford - Washington District Office
A. J. (Tony) Di Maggio - Quality Assurance (Corporate)
R. E. (Bob) Lee - Division Engineer

APPENDIX K

EXHIBIT 20

INTER-OFFICE CO...

DETROIT/AUTOMOTIVE

DATE: February 2, 1972

FROM: J. N. Bradley

TITLE AND/OR OFFICE: Mgr. Wheel-Brake Engineering
Chassis Components

TO: Mr. V. Utykanski

CC: Messrs. R. C. Horton
D. M. Scraver
E. J. Haug
H. C. Ruska
J. S. Schmitt

SUBJECT: TRUCK RIM LINE STUDY

Please refer to your letter of January 26, 1972 on the above subject. You have asked Engineering to examine your chart to determine the possibility of combining various rim styles into one common design. You have referred to 15 separate rim styles now in production. These 15 separate rim styles can be divided into 6 categories as I have shown attached. Rims cannot be made interchangeable between categories because they are used for different purposes. Within a category you will find that each rim manufacturer has one to two designs. Designs are not interchangeable between rim companies generally because the side rings are not interchangeable. If a customer is using one brand of rim, i.e., a Goodyear LW, he will not agree to buy Firestone 5° rims because he cannot afford to mix side rings on the same truck fleet. Mixed side rings are a definite safety hazard and must be avoided at all costs. There is a growing tendency [illegible] industry for standardization. You will note that in the [illegible] weight rims that both Firestone and Goodyear make an LB rim where the side rings are interchangeable. If we were to compete for our part of the market in rims, we would have to duplicate the design of the rim now being used. For example, we too would have to make an LB rim in order to compete with both Firestone and Goodyear for this part of the business.

We expect that the XL rim will eventually replace the RH5°. At the present time, General Motors and Chevrolet are planning to use the XL rim starting January 1, 1973. Ford Motor is also looking at the XL rim but we have had no indication as to when or if they plan to switch over from the RH5° to the XL rim.

Please advise if we can be of further assistance.

J. N. Bradley

JNB/al

B7052

APPENDIX L

EXHIBIT 45

THE BUDD COMPANY

WHEEL AND BRAKE DIVISION / DETROIT, MICHIGAN 48213

March 22, 1973

Mr. W. T. Smith
The Goodyear Tire & Rubber Company
1144 East Market Street
Akron, Ohio 44316

Subject: Safety-Interchangeability of Multi-Piece Highway Rim Components

COUSINEAU

Dear Tom,

In response to your letter of March 19, 1973, enclosed are three drawings BRM-252 7.50 FL Rim, BRM-255 7.50 DT LB Rim, and 96149 5.50 Duo Rim. As discussed in your letter these drawings will be used to establish an interchangeability chart showing that Goodyear rings will be used with Budd rims.

Please note that part number 96149 Budd Duo Rim is obsolete. Later models of this rim are not approved for Goodyear LTS side rings, not because the side rings do not fit because the side rings will fit on the rim perfectly, but because when Goodyear side rings are used on our revised models it narrows the width of the rim; consequently, we have approved certain wheel part numbers as being recommended for use with Goodyear LTS side rings. These part numbers are as follows:

86680	86130
87430	86140
87440	87160
87560	87500
87740	87510
86940	
88540	
88630	

B 7285

Continued next page....

EXHIBIT #45

Appendix L
Exhibit 45

THE BUDD COMPANY

Mr. W. T. Smith
Goodyear

March 22, 1973

As discussed in our telephone conversation of 3/21/73, you are also going to send us your latest drawings of the Goodyear side rings for our analysis of interchangeability.

Please advise if you have any questions about our design.

Very truly yours,

J. N. Bradley
Manager
Wheel & Brake Engineering

JNB/al

Attachment: BRM-252
BRM-255
96149

COUSINEAU

CC: Mr. R. C. Norton

APPENDIX M

EXHIBIT 44

MEMORANDUM

October 16, 1970

R J BURNS

L R FIELDS

T A MARTIN

0530014O1

SUBJECT: Exchange of Drawings - Goodyear/Firestone

The attached letter is the result of my pushing G L Gerbeth to get such an exchange procedure established.

I think you will agree that this is a step forward.

C D Thompson
Manager
Rim Product Sales

CDT:feb
Att

EXHIBIT #44

APPENDIX N

EXHIBIT 44

Firestone Steel Products Company

DIVISION OF THE FIRESTONE TIRE & RUBBER COMPANY
HARVEY S. FIRESTONE - FOUNDER

AKRON, OHIO 44301

September 23, 1970

The Goodyear Tire and Rubber Company
Metal Products Division
Akron, Ohio 44316

Attention: Mr. G. L. Gerbeth
Manager
Product Design and Development

Subject: EXCHANGE OF DRAWINGS COVERING INTERCHANGEABLE GOODYEAR/FIRESTONE RIMS AND COMPONENTS

0530014002

Dear Mr. Gerbeth,

We welcome this opportunity to formalize the exchange of drawings covering interchangeable parts made by our respective companies. While this has been done in the past on a request basis, an automatic procedure will represent an even further extension of the efforts of both, Firestone and Goodyear to promote product safety. This exchange will become part of our normal operating procedure and we will, of course, expect this to be reciprocal as indicated in your letter of August 21, 1970.

The development and manufacture of earth mover rims is now the responsibility of the Electric Wheel Division, Quincy, Illinois. We will forward a copy of this letter and your request to Mr. W. A. Voorhees, President, so that he may consider and advise you on a similar exchange.

Very truly yours,

R. F. Harold
Director
Research and Development

RFH:bn
cc: Mr. W. A. Voorhees

Firestone — Your Symbol of Quality and Service

APPENDIX O

EXHIBIT 41

NATIONAL
WHEEL & RIM
ASSOCIATION

4636 VICTOR STREET · JACKSONVILLE, FLORIDA 32207 · PHONE 904/737-2900

February 14, 1979

Mr. David P. Zart
FIRESTONE STEEL PRODUCTS COMPANY
P. O. Box 2785
Akron, Ohio 44301

Dear Dave:

Thank you for participating in Monday's Multi-piece Rim Committee Meeting at the Congressional Country Club in Potomac, Maryland.

The Association has retained Mr. Jeff Myers of Neil A. Myers as counsel for the committee for the purpose of responding to NHTSA's proposed rule-making on multi-piece rims.

The next step the committee will take is to involve Mr. Myers and the manufacturers' counsel, that were present at the meeting, meet to review Monday's recommendations of subjects that will be covered in the committee's response to NHTSA's proposed multi-piece rim rule. After this meeting, a draft of the recommended subjects of the response will be sent to you for your review.

It was generally agreed by the manufacturers present that they would support the committee by supplying it with expert witnesses, exhibits, statistics, and funds for legal expenses. The legal expenses would be invoiced on a prorated basis monthly with a projection of the expenses for the coming month. Those who could not make a specific commitment have indicated that a decision on supporting the committee would be made after consultations with others in their company and/or after publication of the proposed multi-piece rim rule later this month.

President Gene DiSano has appointed committee members Messrs Ralph Willis and Dan Ludvig, who are from the Washington area, to work in close liaison with Mr. Myers

Very truly yours,

NATIONAL WHEEL & RIM ASSOCIATION

Bryan W. Lewis
Executive Vice President

BWL:rg
cc: Martin O'Neal, Chairman
Gene DiSano
Jeff Myers
Joseph Downs
William Kreivogel

EXHIBIT #41 55194

APPENDIX P

EXHIBIT 34

INTER-OFFICE CORRESPONDENCE

Budd

DETROIT
(PLANT/OFFICE)

DATE: January 27, 1977

FROM: W. R. Krauss

TITLE AND/OR OFFICE: General Manager
Wheel and Brake Division

TO: Mr. K. P. Knudsen

cc: Mr. T. I. Davenport

Ralph Received
To Legal
Feb 17 1977

File - Wheel & Rim Manufacturers

Subject -

There have been several meetings of the Wheel and Rim manufacturers (Budd, Kelsey-Hayes, Motor Wheel, and Firestone) in the past year to investigate areas of mutual concern as pertains to safety legislation.

The first meeting was held at Fireston in Akron, Ohio on August 12th and 13th, 1976, and the second meeting was held at Kelsey-Hayes in Romulus on September 13th, 1976. Each representative of the wheel companies including myself were accompanied with their Corporate Counsel.

The original thrust of this [illegible] group was to promote a standard through OSHA pertaining to wheel safety and more particularly relating to multi-piece rims. We already have the support of D.O.T. - N.H.T.S.A.

COUSINEAU

A second consideration of our group was to determine if it would be worthwhile to form an association of wheel manufacturers to carry forth our mission.

After weighing the problems that could be associated with a small group of competitors meeting on a scheduled basis, it was agreed that we would investigate becoming part of an existing association. Several that were investigated or considered were:

1. S.A.E. - Society of Automotive Engineers
2. N.W.R.A. - National Wheel and Rim Association
3. M.E.M.A. - Motor Equipment Manufacturers Association
4. R.M.A. - Rubber Manufacturers Association

The one organization which has by-laws that could serve our needs is the R.M.A.

The attached letter from John F. McCuen, Corporate Counsel of Kelsey-Hayes, (until February 7th when he joins Sheller Globe) pretty well outlines his approach to this group.

E 366

EXHIBIT #34

Appendix P
Exhibit 34

In a phone conversation with Mr. McCuen yesterday, he informs me that Firestone, Kelsey-Hayes, and Motor Wheel have strong feelings that such an association should exist. I believe the following items are being considered for establishing this association.

1. To promote safety legislation through Washington organizations to remove all of the burden from Wheel and Rim manufacturers as it now seems to exist.

2. Monitor new proposed legislation through Washington organizations that affect the Wheel and Rim producers.

It seems to be the feeling that the Wheel and Rim manufacturer takes the full blame of any problem in the field even when it is a case of sheer negligence on the part of the mechanic or operator.

My personal feeling is that we already belong to enough associations in the industry where we work on engineering and sales programs. I am not, however, qualified to evaluate an organization of this type as to how it could affect our insurance and product liability exposures.

COUGHLIN EXH

After you have had a chance to review this memo, I would suggest that we discuss this with Mr. Davenport for his views. I expect that there will be another meeting of the manufacturers in the next couple of weeks at which time we will be asked for our recommendations.

Attached is the petition that we are currently pushing in Washington as well as a copy of the attendance list at the August meeting.

W. R. KRAUSS

Attachments

APPENDIX Q

Appendix Q
Exhibit 33

EXHIBIT 33

MOTOR WHEEL CORPORATION
OFFICE MEMO

To R. J. Derleth cc: P. Fair
D. Dohnal
K. O'Neil
G. Gerbeth

Date January 25, 1977

Re Training Program For Goodyear Truck Tire Mechanics

As a result of our conversation with Joe Hutchinson, a meeting was held in Joe's office on Monday, January 24th to explore the need for a Goodyear training program for truck rim and tire mechanics. The following people were present:

Joe Hutchinson	Vice President
J. M. Henderson	Mgr. Sales Training
J. L. Florin	Mgr. Tire Div. Sales Training
Paul Schlimm	Ass't. Mgr. Truck Tire Sales
Dick Cummings	Mgr. Corporate Safety
Paul Evans	Corporate Safety
Jim Rigrish	Legal
Jones Smith	Commercial Tire Engineer

Joe Hutchinson and I proposed that in view of the petition to OSHA requiring employers to train and instruct tire mechanics, Goodyear should certainly be committed to such a program within its own house, and that we did not feel an adequate training program did exist. Although there were some objections to this, generally the group did agree that the "training" consisted of sending out wall charts and instruction manuals and requiring safety cages to be available and - hopefully - used.

Dick Cummings had reviewed his accident reports and indicated his support for a renewed approach to the problem.

The meeting concluded with sales training being requested to put together a program involving a training film on truck rims and an updating of the current earthmover film. They will initiate a budget which Joe Hutchinson and Dick Cummings will expedite for signatures. Jack Florin will be heading this project and has indicated he will be contacting Motor Wheel for input into the film. I'm sure Bob Smith, John Kinstler, Gerbeth, and Tom Smith will be asked for advice and direction.

EXHIBIT #33

I personally am quite pleased with the way the meeting went and will keep you informed on the progress.

M. J. Lincoln
M. J. Lincoln

MJL/ld

D 0 0 0 2 0 7

APPENDIX R

Appendix R
Excerpts — Deposition of Ronald Jaeger
April 1, 1981

EXCERPTS — DEPOSITION OF RONALD JAEGER APRIL 1, 1981

where Mark Cousineau had been changing the wheels, if anything?

A Well, I guess all I observed was the tire was laying there and split apart, and that was about it. Cousineau and them were gone already.

Q So Mark Cousineau was not there at the time you got back.

A No.

Q The tire, when you said it was laying there, was it a tire and a wheel or was it just a tire?

A No, it was the tire and a rim and all, except it was blown apart.

Q Okay.

MR. WARDLE: I'm going to object to the witness concluding that it was blown apart, since he wasn't present when whatever took place did take place.

MR. SKUPIN: I join in the objection.

Q (By Mr. Tyler continuing) What as far as the wheel itself, what position were the relative parts of the wheel, if you understand what I'm asking you, at the time that you observed it?

A It was laying there on the ground and the top part of the rim was laying on this side and the chain was around one side of it.

Appendix R
Excerpts — Deposition of Ronald Jaeger
April 1, 1981

- Ronald Jaeger -

Building?

A Yes.

Q What did you do with that wheel and tire, if anything?

A Well, to start with, we put it on the side and then see, I believe later we moved it over to the Wurth Building for storage. We took the tire off, but we moved it over to the Wurth Building for storage.

Then in the middle of the winter, we had to get it out of the Wurth Building. It was bought, so somehow it got moved back to our place and from there, we don't know which is which for sure.

Q Okay. Your understanding is the wheel that was involved in the incident with Mark Cousineau did come back to your location at some time.

A Right.

Q As far as where that specific wheel is today, you're not sure; is that correct?

A Right.

Q Okay. The wheel which has been marked as Exhibit Number One, can you tell me whether or not that wheel is similar to the wheel that you have just referred to?

MR. WARDLE: Excuse me. I'm going to object. I don't think there has been a sufficient

Appendix R
Excerpts — Deposition of Ronald Jaeger
April 1, 1981

- Ronald Jaeger -

foundation as to what is being inquired about when you talk about similarity; similarity in size, number of parts, similarity in appearance, in terms of the wear and tear or what?

MR. TYLER: Okay. Your objection is noted.

MR. MALONE: I would also join in that objection, because the Deponent -- it's not been established whether the Deponent is capable of drawing any similarities between wheels.

MR. SKUPIN: I join in the objection.

MR. MADEAU: I join in the objection also.

MR. THOMZ: Also on the basis of relevancy. This wheel was obviously not involved. Therefore -- go ahead over the objection.

Q (By Mr. Tyler continuing) All right. Mr. Jaeger, my question is can you tell me whether or not the wheel which has been marked as Exhibit Number One, whether that is similar to the wheel that was at the scene of Mark Cousineau's incident, which you have just referred to earlier in your testimony?

A It's similar to the wheel.

Q Okay. In what respects is it similar?

Appendix R

Excerpts — Deposition of Ronald Jaeger

April 1, 1981

- Ronald Jaeger -

A It was three pieces.

Q As far as the shape, size and configuration of three pieces of Exhibit One, was that the same as the size, shape and configuration as the three pieces of the wheel involved with the Mark Cousineau incident?

A Yes.

MR. MALONE: I'd object to the compound nature of the question.

MR. TYLER: He answered yes. I think that takes care of it.

MR. MALONE: So it's your understanding, sir, that your answer is yes, it was similar in size and the shape and the configuration?

THE WITNESS: Yeah, I'd say yes.

Q (By Mr. Tyler continuing) That wheel that has been marked as Exhibit Number One, Mr. Jaeger, have you seen that wheel before today?

A You mean have I seen this particular wheel before today?

Q Right.

A Yeah, you got it at our shop.

Q Okay. You recall me coming up there some number of months ago and talking to you, correct?

A Yes.

Appendix R

Excerpts — Deposition of Ronald Jaeger

April 1, 1981

- Ronald Jaeger -

A Right.

Q Do you know on the day of the incident with Mark Cousineau, the wheels that were there to be repaired that Mark Cousineau would have worked on, would you know what vehicle those wheels came off of?

A No.

Q As far as specifying either a specific Ford or International, you would not know.

A No.

Q As far as you know, prior to the time that Mark Cousineau was injured, had any other person ever been injured with a multi-piece wheel on the company's premises before?

A Not that I know of.

Q Do you ever recall receiving any kind of information or communication, either verbal or written, with respect to multi-piece wheels at any time prior to the time that Mark Cousineau was injured?

A Not that I recall, no.

MR. TYLER: I don't have any other questions. Thank you very much. These other gentlemen have a right to ask you questions if they want.

Appendix R

Excerpts — Deposition of Ronald Jaeger

April 1, 1981

- Ronald Jaeger -

A No.

Q You've never been around when there has -- never been around at any time prior to this accident when there has been an accident with a multi-piece wheel; is that correct? You've never encountered another accident involving another multi-piece wheel in your lifetime?

A No, I haven't.

Q Other than this one.

A Right.

Q Have you ever heard of any other accidents involving multi-piece wheels prior to this accident?

A Well, I did after it. I don't recall if I did before.

Q You were, I take it, instructed at some point in time in connection with your employment to double chain these wheels upon inflation, and that is why you did it?

A I was instructed?

Q Somebody told you at some point in time that that is how you should do it?

A (No response.)

Q This wasn't your own idea, was it?

A I don't know. I think when I worked at the gas station when I was a kid, we double-chained them. Probably I was instructed there. That's a long time back.

APPENDIX S

Appendix S
Excerpts — Deposition of Ronald Jaeger
April 2, 1981

EXCERPTS — DEPOSITION OF RONALD JAEGER APRIL 2, 1981

RE-EXAMINATION

BY MR. THOME:

Q One question while he's looking, sir. Was your company cited for any OSHA violation or any safety violation as a result of this accident?

MR. TYLER: I object to form and foundation --

MR. THOME: Could you answer?

MR. TYLER: -- relevancy and materiality.

A I don't recall.

Q (By Mr. Thome continuing): You don't recall. Who would have that knowledge, John?

A He could. I don't know.

Q But as far as you know, your company was not cited, correct?

MR. TYLER: He already answered it.

A I already answered the question. I said I don't recall.

RE-EXAMINATION

BY MR. MALONE:

Q One or two. Mr. Jaeger, is it fair to say that you ran the operation out in the yard as opposed to your brother running the office of Northern Asphalt?

A Yes, that would be fair to say.

Appendix S
Excerpts — Deposition of Ronald Jaeger
April 2, 1981

Q (By Mr. Malone continuing): So is it fair or accurate to say that the three piece rim assembly that was involved in the Cousineau accident had been used before by Northern Asphalt?

A It's fair to say its been used before?

Q Yes.

A Yes, because it had one of our truck tires on it at the time he took that truck tire off and put it back on the same rim, so it was our tire.

Q Okay. But the components had been used together before; isn't that right?

A At that particular -- yeah.

Q And you don't know how many times they had been used together before.

A No.

Q You don't recall having any other incident where a multi-piece -- three piece tire disengaged prior to the accident; isn't that right?

A That's right.

Q Okay.

MR. NEIMAN: Off the record.

(Discussion held off the record.)

Q (By Mr. Malone continuing): Sir, would you store your

APPENDIX T

Appendix T

Exhibit 2 — Affidavit of Jack L. Campau

EXHIBIT 2—AFFIDAVIT OF JACK L. CAMPAU

STATE OF MICHIGAN

IN THE COURT OF APPEALS

THELMA COUSINEAU, Personal Representative of the Estate of MARK COUSINEAU,

Appellant,

vs. Court of Appeals No. 69363

FORD MOTOR COMPANY, a foreign corporation, INTERNATIONAL HARVESTER COMPANY, a foreign corporation, GOODYEAR TIRE & RUBBER COMPANY, a foreign corporation, KELSEY HAYES CORPORATION, a foreign corporation, BUDD CORPORATION, a foreign corporation FIRESTONE TIRE & RUBBER COMPANY, a foreign corporation, FRUEHAUF CORPORATION, a foreign corporation, and AMF, INC., a foreign corporation,

Defendants.

_____/

AFFIDAVIT OF JACK L. CAMPAU

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

I, Jack L. Campau, being first duly sworn, deposes and says:

1. That I examined a three-piece multi-piece rim assembly banded with Tyden seal #6969 marked as Plaintiff's Exhibit 1 of April 1, 1981.

2. That the three (3) parts are as follows:

rim base: Firestone 20 x 7.5 FL
2 68 (possibly 63)

side ring: Firestone 20 x 7.0 5°
20 x 8.0 RTH5°
8 59 Made in USA

lock ring: Firestone 20 X 7.0 7.5 8.0 5°
Made in USA
10 59 Pat. 2537624

3. That the lock ring is opened up and slightly spiraled; that this condition would not result from normal servicing; that this condition [illegible] resulted from separation under

EXHIBIT 2

LAW OFFICES
ROBERT A. TYLER
PROFESSIONAL CORPORATION
1874 PENOBSCOT BUILDING
DETROIT, MICHIGAN 48226
(313) 961-2878

pressure.

5. That additional preliminary review of the literature suggests that the afore-referenced assembly contains mismatched parts; that mismatched parts contribute to separation.

Further affiant sayeth not.

JACK L. CAMPAU

Subscribed and sworn to before me
this 31st day of January, 1984

NOTARY PUBLIC, WAYNE COUNTY, MI
Maureen M. Meade
My Commission Expires: 5-20-85

LAW OFFICES
ROBERT A. TYLER
PROFESSIONAL CORPORATION
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APPENDIX U

Appendix U
Transcript of Proceedings
December 10, 1982

TRANSCRIPT OF PROCEEDINGS
DECEMBER 10, 1982

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

THELMA COUSINEAU, Personal Representative for the Estate of HANS COUSINEAU, Deceased,

Plaintiff,

-v- Civil Action No: 80-039185-NP

FORD MOTOR COMPANY, a foreign corporation, INTERNATIONAL HARVESTER COMPANY, a foreign corporation, GOODYEAR TIRE & RUBBER COMPANY, a foreign corporation, KELSEY HAYES CORPORATION, a foreign corporation, FIRESTONE TIRE & RUBBER COMPANY, a foreign corporation, FRUEHAUF CORPORATION, a foreign corporation, and AMF INC., a foreign corporation,

Defendants.

PROCEEDINGS had before the HONORABLE IRWIN H. BOARDICK, Circuit Judge, Third Judicial Circuit, held in Room 1607 City-County Building, Detroit, Michigan on Friday, December 10, 1982.

APPEARANCES:

MR. ROBERT TYLER, ESQ., and MR. STEVEN NICHOLS, ESQ.

Appearing on behalf of Plaintiff

MR. KHAFRA OKHAH, ESQ., and MR. DANIEL P. [illegible], ESQ.

Appearing on behalf of Defendant Firestone Tire & Rubber Company

(cont'd)

(Appearances continued):

MR. JOHN LYNCH, ESQ.

Appearing on behalf of Defendant Goodyear Tire & Rubber Company

MR. STEVEN C. RADEAU, ESQ.

Appearing on behalf of Defendant Ford Motor Company

MR. DENNIS M. RAFFEY, ESQ.

Appearing on behalf of Defendant International Harvester Company

MR. EDWARD PLATO, ESQ.

Appearing on behalf of Defendant Budd Corporation

MR. TIMOTHY SULLIVAN, ESQ.

Appearing on behalf of Defendant Kelsey-Hayes Corporation and Fruehauf Corporation.

* * *

Aundrea Hill, C.S.R.
Official Court Reporter MO-048

Detroit, Michigan

December 10, 1982

Morning Session.

THE CLERK: Case number 80-039185-NP, Thelma Cousineau versus Ford Motor Company, et al.

MR. OPHAN: We started out in this case in about March of 1982, really, and this case kind of intertwines with three other cases--wheel cases. The reason I say March, in March, Mr. Tyler had a lot of outstanding discovery pending in other cases. We agreed Mr. Tyler be allowed to go down to the Firestone Document Depository in Kansas City. That was in March of 1982.

Mr. Tyler made his arrangements, supposedly, to go down there and finally got himself down there in July of 1982, four months later.

July 23rd of 1982 we were all here on motions by all of the Defendants for Summary Judgment. And at that time, your Honor set a hearing for a date for further hearing, giving the Plaintiff ninety days to complete his discovery and you set a hearing date for October 22, 1982.

Now in October, on behalf of Firestone,

October 7th, to be specific, at the request of Mr. Tyler, after his visit down to the depository, a substantial number of documents were provided by Firestone.

October 15th, Mr. Mickey was back here asking for more time to adjourn the October 22nd hearing date saying he needed more time to review those documents and he was accommodated by your Honor, and he was given until the hearing set for November 26th. That's when your Honor thought we were all going to be here.

Now on November the 9th, 1982, with respect to Firestone, Plaintiff made his first request for any documents in the case entitled Cousineau versus Firestone, Ford, etc., et al.

The first request was November the 9th. We were here on July the 23rd. We was given ninety days to complete his discovery. It wasn't until November 9th he made his first request for documents. That request was not received by out office until the 12th--the 12th of November.

The 12th of November through the 19th of November we went crazy trying to get the documents to Mr. Tyler, and hand delivered them--hundreds of

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December 10, 1982

documents--to Mr. Tyler.

Finally, by the 24th of November, three remaining documents, which were vast long computer print-outs of sales, were finally delivered to Mr. Tyler.

On the 24th, the same day, Mr. Tyler's office called and said he wanted to adjourn the hearing that was scheduled at that time for November 26th. I objected. And it was represented to me the other parties had agreed to the adjournment. I objected and said I wanted to have it heard on the 26th. He had plenty of time, since he's had the bulk of the documents since October 7th. He had plenty of time.

In any event, the Court agreed to the adjournment of this matter. Today I get a letter from Mr. Tyler's office--today--and that's why we're here today, instead of the 26th. I don't know hot it happened the Court was not advised of the adjournment, and now here we sit from our motions having been filed in July. It's now December.

We produced everything we can produce, with the exception of perhaps there may be a few documents that were not produced just because of the vast number of documents bing produced.

I can't represent that Mr. Tyler has everything he ever asked for, but inhis one and only request for the Cousineau documents of November the 9th, we have sent those documents to him and have not heard one word from him since then.

We are prepared to argue our Motion for Summary Judgment we argued on the 23rd. What we're really here for, as I understand--Mr. Tyler should not be in a position to show your Honor that this case falls within the constraints of the law set out in Abel v Eli Lilly and Co., 94 Mich App 59, which says you could sue all the Defendants if you have all Defendants here. Show us how it fits into the Abel case.

Now he filed twenty something pages of briefs; hundreds of pages of documents. And as you condense it down, what he's shown to the Court is that you have wheel manufacturers who make wheels. They all look alike because they're all round. They all go on vehicles. They have charts. They have numbers.

They even petitioned the government or enacted OSHA regulations which would require the people to use safety cages, and they say that is a dastardly act, on our part. I'm proud of the fact it was enacted and effected in April of 1980, and it requires that

employers train their people and they post charts on the wall that contain certain information for those people to have to do their job safely.

Plaintiff says that is somehow part of the concerted action--some evil design by the Defendants. I think that's a clear implication of his response, that somehow we've done something bad because we've moved for enactment of the OSHA standards and we got the National Highway, Traffic, Safety Administration to help us.

We asked the Rubber Manufacturers Association to present the petition. We got involved with Congress. We would have asked your Honor, if we thought your Honor could have helped us pass OSHA regulations.

The industry got it passed and it is stated in some of the correspondence attached. It's the only known industry that has ever done that.

THE COURT: He couldn't identify which company manufactured the wheel.

MR. ORHAN: Here we are and he has nothing in opposition to each one of these products. When they are made, they are stamped and the name of the manufacturer or logo is put on them and can be identified by anyone that made it. This case is nothing more than a lost piece of evidence.

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Now in his response, he says people are working on multi-piece wheels and they do it in the yard and they could get co-mingled. You drive down the street, they come take it away; it's gone.

MR. TYLER: To correct a few background facts Mr. Orhan gave you, this case was filed in April of 1982. The discovery should not be closed until December of this year.

I filed a fairly massive set of discovery requests directed to the Defendants in the form of Interrogatories, Request for Productions of Documents, things of that nature.

Most, if not all of them, filed objections to it and we came in and we cut a deal. In exchange for not having to respond to that, I got into all their document depositories where the documents had happened to be. Obviously, if we go back and pull all the transcripts from the--

THE COURT: It's been here several times.

MR. TYLER: The Defendants said, "We what to bring Motions for Summary Judgment," and they stood in this courtroom and they said, "That's what our intent is, to bring a Motion for Summary Judgment, to find out whether or not the law in this state allows an

action of this type." They said those motions would be filed approximately six weeks. Literally, months went by. I was on the phone calling the Defendants, saying, "When are you going to file your motion?"

During that time no other discovery was going on, except for the fact I would have access to their documents. They filed their motions months after we were here. I went into the document depositories and addressed Mr. Orhan directly. I went into Firestone's in July. I have about five or six of these wheel cases that are in some form of litigation at the present time.

The understanding with Mr. Orhan was, I was --I would go in there and rather than ask for documents in every case, I would ask for documents in a case called Spencer versus Firestone, because that was going to be the first case up for trial.

Then after I was in there, then what I would do once I got the Spencer documents, I would send a new list to Mr. Orhan and I would say, "These are the Spencer documents which I want to be Cousineau." You cannot use the documents from one case in another case because of Protective Orders. That was all agreeable.

I was in the Document Depository in July.

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I made my request for documents at that time in the Spencer case. We had experts' depositions scheduled for the first part of August. I talked to Mr. Orban. I said, "I want the documents before the experts' depositions." Go ahead, fine.

Then those depositions were adjourned because of the unavailability of my expert. Then those documents never showed up until October and they never showed up until I had to put preasure on Firestone to send me the documents that I requested back in July.

Those documents, most of which rolled in around the first part of October, they still didn't send me all the documents.

We had to send them another list and say, "Give us the rest of the documents we requested." They gave us another batch of documents. Still, as we stand here today, they still have not honored all the requests.

Mr. Orban and I had a discussion a few days ago and I told him, "You still owe me documents." He said, "We can't find them." I said, "It's your Document Depository. I gave you your case numbers." The burden of that falls on them, not on me. They still have not produced all the documents, so I could not have

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all of the documents of Cousineau. We're talking about masses of documents, probably between all of the Defendants, a file cabinet full of documents. It takes awhile to go through those. I did that. They were Cousineau's.

Before that time had happened, when they came back in for the hearing on the Motion for Summary Judgment, I filed a brief and I addressed the legal issues only because my understanding, the Court was going to rule whether or not there was a legally recognizable cause of action in this state of enterprise liability, concerted action, etc., etc.

All of a sudden, at that hearing, then the Defendant starts saying he can't fir the facts of his case in this case. And the Court, at that point said, "Okay, I'm going to give you ninety days of discovery."

When no discovery, except for getting documents had gone on, "I'm going to give you ninety days of discovery to put the facts of this case into the law." In ninety days, I couldn't do it, so we came back.

Mr. Hickey came in and asked for an extension which the Court granted. The discovery cut-off was made November 19th. In October, I sent a small set of

Interrogatories directing the issues involved, such as who else made three piece rims, etc., etc.

I sent requests for admissions again directed to the issues involved in this matter, such as, Did you manufacture a three piece rim? As we stand here today, the response to those requests for admissions have, in some instances of the Defendants, only been received within the last couple days. Some of the people, Firestone and some of the other people answered within the time-frame that we had agreed that they would answer. I even gave them some time up to the discovery cut-off.

As we stand here today, only two or maybe three Defendants have answered the ~~interrogatories~~, the two sets I've seen, and that's Ford and Firestone; they have not answered them. They've given me nonsense answers because they talk about, 'We can't answer those Interrogatories. You define the rim, and you're going to ask questions about the rim and nobody knows about the accident rim.'

I have a rim sitting in my office that was up in Escanaba when we took the deposition that was identified as the rim that two of the persons that was there at the time of the accident said was similar.

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In my Interrogatories, I referred to that rim marked as an Exhibit which has been available to the Defendants for months and months and months. Then they give me answers to the Interrogatories saying, "I can't answer this because nobody knows what the rim looks like."

THE COURT: I extended the period of time for you, initially. I gave you ninety days.

MR. TYLER: With all due respect to the Court, --

THE COURT: I'm going to grant the Motion for Summary Judgment and let it go at that. I gave you all the time that you wanted.

MR. TYLER: But, your Honor, I need--

THE COURT: Every time you come in here, you want additional extentions.

MR. TYLER: I'm not asking for additional time or extention. I'm trying to point out the fact this Court legally and procedurally ca nnot grant the Motion for Summary Judgment because of the fact--at least one reason is the fact there's still discovery outstanding and the Defendants have not responded to it. And there's pure case law on the fact that until discovery is over with, albeit, I feel like I have not

had full discovery, but even under the rules the Court set down in this case, they have not supplied me with discovery.

Goodyear and Firestone--everybody owes me documents and everybody owes me answers to interrogatories. I filed a motion that is up for next week, an Order to Strike thier responses for failure to respond to the discovery. And the way the motion got up for today is that every Defendant in this case, except Firestone, agreed to this.

I called them up and I said, "Look we are trying very hard to get a brief in on time so the Court will have it a few days ahead of time before the motion that was originally scheduled. But I want to tell you, it's going to be close to forty papers. They're going to be a couple inches of documents."

They're right here, and that is what has been filed. I said, "I doubt if the Court will have time to fully read that and..."

MR. LYNCH: John Lynch. Let me just say this: Even if you conceded Mr. Tyler's argument, there is some discovery he still could have. He's got literally thousands of documents from Goodyear and Firestone.

The real point, we were trying to save time and expense and money of having to produce all of this stuff, because he could never, even with all of this stuff, identify the Defendant in question. So that's why we were trying to cut things sort; not to deprive him of the right of discovery, but to save the Defendants thousands of dollars and lots of time.

When the product can be identified, if you've got it and everyone agrees, if it was a Goodyear rim, it would say "Goodyear." And certainly, it would have a serial number. It would be a "Goodyear" only and everybody would be ready to go home.

If you lost the evidence, are you entitled to sue the world and claim they are somehow negligent?

If he got all the discovery he wanted, it would not go to the issue of whether or not he lost the evidence.

THE COURT: I don't think he lost the evidence. It disappeared.

MR. LYNCH: If the evidence were here, it would clearly identify the one and only Defendant that should be here. Should he now be allowed to sue eleven Defendants, claiming that somehow we're all responsible for the rim? That's why we're trying to shorten it.

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THE COURT: What he's saying, the whole industry is responsible. Actually, if the rim were available or identifiable, there would only be one Defendant, no question about that.

MR. LYNCH: Abel v Eli Lilly sets a certain critaria of what it takes to get in the bounds of the Abel case. It has to be completely indistinguishable.

There's no way the Plaintiff would ever be able to identify the manufacturer of it. In the Abel case the Judge said, 'Let the Supreme Court deal with this problem on the Appellate level and give us some guidance.'

We're continuing to cause loss of time, energy and money and going through thousands of more documents to prove that he can never find the rim.

MR. SULLIVAN: Timothy Sullivan. I represent Kelsey-Hayes and Fruehauf. We have not filed any Motion for Summary Judgment. It is my agreement with Mr. Tyler we would both be bound by the Court's ruling. I would just like to put that on the record.

MR. HAFFEY: Dennis Haffey, on behalf of International Harvester Company. The Court has accurately framed the issue as an attack on the industry, but it's important to keep in mind what industry.

Plaintiff's attack is on the wheel industry.

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I've made this point continuously. Plaintiff filed this massive brief and International Harvester was not even mentioned in this discussion of conspiracy. We're not even mentioned. I filed answers to the request for admissions. I didn't even ask for an extension. I filed the Interrogatories. They're in the file.

You'll notice he didn't even mention International Harvester's answers as being inadequate. My guy has been offered up for deposition. International Harvester is a vehicle manufacturer and has nothing to dowith the rim industry. The rim industry has supplied this vehicle with two piece rims, not three piece rims. The individual working involved was working on a bias tire. Our tires are radial tires.

MR. RADEAU: Steven Radeau, on behalf of Ford Motor Company. Ford is obviously in a similar position. We did not make wheels. The wheel caused the accident, not the truck. It wasn't a truck that had a wheel that caused it to go off the road, that type of thing. This is not an alternative liability case. There's no product identification.

But even if, for some strange reason, the Court feels the wheel manufacturer should be here, we don't think they should be, either--we think the wheel

manufacturer should be out of the case, in any event.

THE COURT: Anybody else?

MR. ORHAN: This matter is going to be decided on the Appellate level if the Motion for Summary Judgment is granted and Plaintiff has a right to appeal this matter.

If your honor denies the motion, then it is a matter of the motion for Leave to Appeal. In any event, he ends up in the Court of Appeals.

THE COURT: Anything further?

MR. TYLER: I was not done with my argument.

THE COURT: Go ahead; finish your argument.

MR. TYLER: Indicating further as to how this motion got scheduled for today, after I talked to all the Defendants, I told Mr. Orhan I was going to indicate to the Court what was going to happen, to all of a sudden get a large brief. I called--I talked to your Clerk. I did not ask for a name or anything. I indicated what was going to happen, as far as the brief. The Clerk said to adjourn it to December 10th.

THE COURT: What is there in the brief that is going to address the issue in this case that is so long there?

MR. TYLER: Everything.

THE COURT: I think Mr. Lynch made the point we're not talking about a generic product that cannot be identified. Obviously, this is a case where the wheel that we're talking about disappeared. It's not the fault of you or anybody else. When the accident occurred, the wheel disappears, so you cannot identify the wheel itself.

All these adjournments were to give you an opportunity to see if you could identify that particular wheel, and this has been the basis of the motion.

If you're saying because they're all in the same industry--Is that what you're saying? This is not a generic product, you know.

MR. TYLER: It is a generiv product and I cannot agree with the Court's representation.

THE COURT: You claim it's a generic product. Based upon the evidence, the Court will grant the Motion for Summary Judgment. You can appeal. Make it one Order.

MR. ORHAN: Thank you, your Honor.

* * *

Appendix U
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STATE OF MICHIGAN)
) SS.
COUNTY OF WAYNE)

I, Aundrea Hill, do hereby certify that I have reported the proceedings had in the above-entitled cause and that I do further certify that the foregoing 20 pages are a true and accurate transcript of the proceedings contained therein.

Aundrea Hill, Official Court Reporter R-044

Aundrea D. Hill, CSR
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